Supreme Court, U.S.
FILED

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No. ________ OFFICE OF THE CLERK

In The

Supreme Court of the United States

◆

BALTIMORE CITY POLICE DEPARTMENT, et al.,
Petitioners,
v.

FRATERNAL ORDER OF POLICE, LODGE 3, et al.,
Respondents.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

Congress enacted the Fair Labor Standards Act ("FLSA") in 1938 to regulate minimum wage and overtime provisions of many private sector employees. Congress exempted from overtime requirements executive, administrative, and professional ("EAP") employees. In the 1940s and 1950s, the Department of Labor ("DOL") promulgated regulations establishing criteria for those exemptions. Decades later, this Court held that, despite solely Tenth Amendment objections, the FLSA could be applied to a municipal transit authority. This Court has described that decision, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), as adopting a balancing test. Since the FLSA has applied to State and local government employers, DOL has not revised its "primary duty" criteria for the EAP exemptions. In this case, employees of the Baltimore City Police Department sued for overtime pay. The Police Department defended on the basis that DOL's regulations and the FLSA are invalid as applied.

1. May DOL's regulations be applied to the Police Department when (a) the only completed notice and comment proceeding pre-dated by decades the application of those regulations to State and local governments, (b) DOL initiated but never completed an on-going proceeding to revise the regulations despite numerous comments from State and local governments filed more than thirteen years ago, and (c) the record documents that application of the regulations in the public sector generally, and to police management specifically, produces arbitrary and capricious results at odds with congressional intent?

QUESTIONS PRESENTED – Continued

2. May the FLSA be applied to the Police Department without (a) considering and balancing evidence, as required by *Garcia*, that application of the FLSA to police management produces undue burdens that result from failures in the national political process, (b) considering constitutional challenges never raised or addressed in *Garcia*, and (c) evaluating whether *Garcia* remains good law?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioner Baltimore City Police Department, although staffed by City-paid employees, was created and operates pursuant to State of Maryland law. Petitioner Thomas C. Frazier is the Commissioner of the Baltimore City Police Department.

Respondent Fraternal Order of Police, Lodge 3, is a labor union which was dismissed as an improper party under 29 U.S.C. § 216(b). App. 10a, 72a. The remaining respondents, union members, are 179 current or former sergeants and lieutenants (of a total of approximately 430) of the Baltimore City Police Department: Robert B. Ackerman, Edward E. Adelhardt, Deal G. Allen, Jr., Thomas Meredith Arthur, John Robert Bailey, Paul F. Bailey, Jess R. Baker, John F. Baker, Jr., Thomas D. Bannon, Joseph J. Beling, Jr., Thomas Berends, John Michael Bevilacqua, George E. Bewley, August A. Beyer, III, Gabriel T. Bittner, Randy W. Blades, Sr., Paul M. Blair, Jr., Edwin J. Boston, Thomas B. Brannock, Larry Bray, David R. Brown, Roger D. Brown, Anthony G. Cannavale, Jr., John Cannon, Michael Cannon, James G. Cappuccino, Jr., Michael J. Cassizzi, Clifton M. Cavey, Joseph A. Chianca, Jr., Gary T. Childs, John J. Christian, Joseph C. Christiansen, Steven D. Cothern, John S. Cowan, Jr., John G. Cree, Jr., John R. Cunningham, Jack N. D'Amario, Joseph J. Darchicourt, Lewis C. Davis, III, Paul E. Davis, Robert DeAngelis, Gerard G. DeManss, Frederick Dillon, Charles J. Dixon, Stanley R. Dorsey, John R. Draa, E.K. Finkenbinder, Robert Floyd, Jr., Regis Leo Flynn, John Foster, Debra L. Fox, Marty Fridinger, Marvin A. Froneberger, Victor Charles Gearhart, Joseph T. Geffert, Edward C.

LIST OF PARTIES AND RULE 29.1 STATEMENT – Continued

Glacken, III, Philip G. Gonyo, Berry Grant, Vernon W. Gray, Jr., Lloyd W. Green, J. Charles Gutberlet, III, William G. Hamlin, Richard L. Hancock, Neil E. Hansen, Michael T. Harding, Phyllis K. Harris (Personal Representative of the Estate of Richard P. Harris), Robert Haukdal, Don W. Helms, John R. Hergenroeder, Henry Herold, Jr., Michael J. Hicks, Louis F. Hill, Rudolph Holley, James R. Horner, Sr., Carl Johnson, Van Steven Johnson, Robert E. Jones, Sr., James V. Kelly, Windsor W. Kessler, Jerry M. Kingsbury, Richard L. Kline, Frederick V. Koch, Edward C. Koluch, Donald F. Kramer, Sr., Donald L. Krebs, Louis N. Kulaga, Michael T. Kundrat, Ronald J. Lamartina, Jay C. Landsman, John W. Laufert, Robert M. Leftwich, David Lipscomb, Harry J. Lober, Jr., Richard J. Long, III, Kurt Lurz, Lawrence S. Maloy, Thomas A. Maly, Timothy C. Markland, Dominic Mastromatteo, John R. McCullom, John E. McHale, Francis K. Melcavage, Stanley F. Mezewski, C. F. Milland, John H. Miller, Paul S. Miller, Donald E. Morgan, Harold Gene Muncy, Julius Murfree, Leander S. Nevin, Mike Newton, Roger W. Nolan, Donald E. Oakjones, Edward V. O'Halloran, Robert A. Oros, Alexander F. Orr, Jr., Stephen R. Pagotto, Nicholas R. Palmeri, Kathleen T. Patek, Kenneth S. Peach, Richard Piel, Richard G. Puller, Tony C. Restivo, Joseph B. Richardson, Joseph Riha, William A. Robbins, III, Jeffrey Rosen, Victor A. Santiago, Anthony J. Sarro, Jr., Edward C. Schmitt, Jr., James P. Schuch, Robert P. Sharp, James R. Sharpe, Russell N. Shea, Jr., David W. Shirey, John V. Sieracki, Jr., John L. Sipes, John E. Slawinski, Ronald M. Smedberg, James E. Smith, Charles A. Snitzel, Ronald E. Spencer,

LIST OF PARTIES AND RULE 29.1 STATEMENT – Continued

Robert M. Stanton, James Starleper, James R. Steedman, Roy Allen Stevens, Kenneth M. Stockwell, William F. Stone, Harold Streat, Andre M. Street, Christopher M. Streett, William Sullivan, Allan R. Swenson, Michael L. Tabor, Joseph E. Teano, John F. Tewey, Thomas J. Uzarowski, Jerry Van Der Meulen, Walter A. Vaughn, Robert G. Vinci, Jo Ann Voelker, John L. Wade, Joseph Weber, Charles Wernz, John M. Wheeler, Gary F. White, Sr., John Wiley, Melvin Wilson, and Wayne R. Wilson.

On November 16, 1998, the City of Baltimore was served notice filed with the district court that the following 100 individuals sought to be added as plaintiffs: Darren Q. Abney, Scott S. Baker, Michael F. Baptist, Carmine R. Baratta, Jr., Matthew J. Bauler, Charles E. Beam, Nicholas M. Beccio, Jr., Theodore Black, Robert M. Booth, James J. Brokus, Steven M. Burrier, Terry J. Caudell, David H. Childs, Joseph R. Conway, Gregory H. Cook, Ronald W. Davis, Laverne R. Day, Robert L. Dean, Jr., Albert E. Denis, Jr., Edward G. Dunlap, Sr., Errol E. Etting, Lawrence A. Frank, Edward M. Frost, III, William R. Furlong, Jr., Rodney R. Giacomelli, Thomas S. Grimes, Donna L. Gutberlet, Duane L. Harrington, Kevin L. Harris, Donald F. Haupt, James T. Henderson, Michael H. Hilliard, Mark E. Holback, Michael E. Holcomb, Richard L. James, Paula T. Johnson, Larry E. Johnston, Sandra M. Joyce, Timothy G. Keel, Ronald E. Kennedy, Jack W. Kincaid, Alexander Klosek, John J. Kowalczuk, Lawrence E. Leeson, Oy B. Lieu, Sherina Y. Long, Charles LoRocco, James F. Magness, Michael T. Mancuso, Gary C. Maratta, Gary E. Martin, Lester M. McCrea, III, Glend W. McGuire,

LIST OF PARTIES AND RULE 29.1 STATEMENT – Continued

Jr., Michael J. McKnight, Terrence P. McLarney, John J. McNamara, Laura A. McVicker, Ernie D. Meadows, Irvin C. Miles, Robert R. Miller, Darryl C. Moore, Vincent E. Moore, Sandra L. Moore, Alonzo Moreland, Charles Morgan, Frederick R. Morgan, Jr., Craig A. Mosier, Vincent C. Moulter, William F. Neugent, Wesley M. Ormrod, Jr., Eugene T. O'Sullivan, Thomas S. Pellegrini, Ronald K. Pettie, Thomas W. Poffenbarger, William D. Price, Zeinab A. Rabold, Charles M. Reich, Jr., Robert Ray Richards, Frederick V. Roussey, Sr., Joseph M. Russell, John A. Russo, Richard A. Scharper, James R. Schmidt, Vernell C. Shaheed, Richard C. Smith, Sr., Andrew Snakovsky, D'Artagnan E. Spencer, Jack L. Spicer, Jr., Perry T. Standfield, Ronald W. Stine, Sr., Kenneth C. Streets, Frederick H. Taber, Jr., Albert H. Taylor, Jr., Walter A. Taylor, John B. Thompson, Terry E. Tolda, George P. Trainor, Buford L. Viars, Isabella Washington, and Mary S. Young.

On February 26, 1999, the City of Baltimore was served notice filed with the district court that the following eight additional individuals sought to be added as plaintiffs: Raymond J. Fisher, Robert W. Foltz, Richard T. Grissom, Jr., Eric D. Jordan, Stephen Nalewajko, Joseph A. Peters, Francis J. Sedlak, Jr., and Joseph E. Smith.

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PETITION FOR WRIT OF CERTIORARI

The Baltimore City Police Department and Police Commissioner Thomas C. Frazier (collectively the "Police Department") respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) and the order denying rehearing and rehearing *en banc* (App. 79a-80a) are unreported. The opinion and order of the district court (App. 9a-70a, 71a-72a) and its order on reconsideration (App. 75a-78a) are also unreported.

JURISDICTION

The Order of the United States Court of Appeals for the Fourth Circuit denying the Police Department's timely Petition for Rehearing with Suggestion for Rehearing *en banc* was issued on February 5, 1999. App. 79a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent text of the following constitutional provisions, statutes and regulations are reprinted in the Appendix:

U.S. Const. art. I, § 8, cl. 3
U.S. Const. art. I, § 8, cl. 18
U.S. Const. art. IV, § 4
U.S. Const. amend. X
5 U.S.C. § 553
5 U.S.C. § 706
29 U.S.C. § 213(a)(1)

The text of 29 C.F.R. Part 541 has been lodged with the Clerk.

STATEMENT OF THE CASE

1. Introduction

This case presents a unique vehicle for the Court to address several different issues that have produced a flood of litigation resulting from the many problems arising from application of the FLSA and DOL's implementing regulations to State and local government employers. This case presents administrative law challenges the Court invited, an unparalleled factual record on the administrative and constitutional issues, and a collection of legal arguments not previously addressed by the Court. Resolution of those issues is a matter of nationwide importance.

This case presents the petition the Court essentially invited in *Auer v. Robbins,* 519 U.S. 452 (1997). In *Auer,* the Court addressed DOL's Part 541 regulations and observed that a notice and comment challenge to those regulations, which was not present in that case, remained available. This case presents precisely that challenge. Moreover, confusion among the lower courts as to the meaning of *Auer* renders it less likely that another vehicle for resolving that uncertainty will present itself in the near future. Unless resolved here, the different and various understandings of *Auer* among the lower courts will further unsettle general administrative law.

This case presents the most comprehensive record yet developed, extensively using expert witnesses and federal records and reports, to address the "balancing" test under *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 554, 556 (1985). The record contains powerful evidence of "failing[s] in the national political process" which result in federal "laws that unduly burden the states" within the meaning of *Garcia,* 469 U.S. at 554, 556. Both Congressman John W. Erlenborn and Professor A.E. Dick Howard were accepted as experts by the district court. App. 77a. Both experts, unopposed by other experts in this case, concluded that failings in the national political process imposed undue burdens upon States and their subdivisions. App. 110a, 130a. Their testimony was supported by a large amount of documentary evidence. App. 96a-98a (list of pertinent exhibits). The district court found that accepting that evidence as true, it failed as a matter of law to satisfy the legal standard in *Garcia, see* app. 78a, even though the court admitted that it did not know what the standard meant. App. 63a-64a. The Fourth Circuit refused to articulate a standard and apply a balancing test, app. 6a-7a, though required to do so by *Garcia*. In short, the Fourth Circuit treated *Garcia* as a bar to review of the record rather than a requirement that the district court apply the balancing test. The court thus abdicated its judicial function to ensure Congress acted within its constitutional authority. *See United States v. Lopez,* 514 U.S. 549, 557 n.2 (1995).

This case presents issues of extreme national importance. The FLSA imposes billions of dollars in costs on State and local governments nationwide. The uncertainty that remains due to the many unresolved issues presented by this case significantly increases those costs.

Application of Part 541 to States and their subdivisions violates the notice and comment requirements of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 553 (App. 82a), a controlling issue of law never previously addressed by this Court or any United States Court of Appeals, in any reported case. The only time Part 541 was subjected to any completed notice and comment procedure was decades before the FLSA was applicable in the public sector. DOL never completed any further rulemaking proceeding before permitting Part 541 to be applied to State and local governments. Instead, DOL has repeatedly ignored comments that identify the unworkability of pre-existing Part 541 in the public sector which have been filed in every available rulemaking proceeding since 1974. DOL abdicated its duty to explain how the pre-existing regulations could be applied unchanged in this radically different context despite DOL's repeated promises to address the issue.

This case also presents an opportunity for the Court to clarify the scope of *dicta* in *Auer* the Fourth Circuit relied upon to avoid addressing on the merits additional challenges to Part 541. This case demonstrates the arbitrary and capricious results that follow from applying pre-existing Part 541 in this context. The expert testimony of Mr. Robert di Grazia, a nationally recognized law enforcement authority and former chief law enforcement officer in several jurisdictions, uncontradicted by other expert witnesses, established that the provisions of Part 541, based upon their plain, English meaning, have no factual applicability to police management. App. 76a, 141a-154a. In addition, the Police Department offered uncontradicted evidence to establish that Part 541 did not operate as intended by Congress when applied to States and local governments.

In addition to the evidentiary record developed to permit application of *Garcia*'s balancing test, this case also presents constitutional challenges to application of the FLSA – under the Commerce Clause, the Necessary and Proper Clause, and the Guarantee Clause – that were not addressed in *Garcia*. If *Garcia* is viewed as foreclosing both the balancing of evidence and consideration of challenges on these other constitutional bases, the Police Department argues that *Garcia* should be overruled in light of this Court's subsequent jurisprudence.

All these challenges are presented here in the context of management of the Baltimore City Police Department. Law enforcement is one of the defining responsibilities of State and local government through which they implement and enforce public policy. As both present Commissioner Thomas C. Frazier and former Commissioner Edward V. Woods testified: "Personnel holding the ranks of sergeant and lieutenant . . . were not promoted

. . . based upon their day to day jobs. They were promoted to provide management leadership in a paramilitary organization in a crisis situation which is by far their most important duty and responsibility. . . . " App. 156a-157a, 161a-162a. In a department in which the annual operating budget approaches $200,000,000, *see* Ex. 61,[1] and the average annual pay of sergeants and lieutenants exceeds $40,000 and approaches $50,000, respectively, *see* Ex. 62, 72, both Commissioners agreed that "direct and indirect personnel costs, primarily salaries and benefits, have been in the range of 90% of total operating budget. Therefore, the budget and potential manning levels are very sensitive to changes in available funding." App. 158a; *see* App. 163a.

The unique management requirements of law enforcement, totally unlike those of the private sector and other State and local government agencies, have been ignored by DOL since 1985, when the FLSA and Part 541 assertedly became applicable to States and their subdivisions at compliance, judgment, and settlement costs now totaling billions of dollars.

2. Statutory and Regulatory Background

To cope with high unemployment levels during the Great Depression, Congress mandated that certain *private* sector employers pay overtime wages to some of their employees. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (the "1938 Act"). Congress enacted an exception for employees engaged in an "executive, administrative, or professional capacity," *id.* § 13(a), 52 Stat. at 1067 (codified as amended at 29 U.S.C. § 213(a)), and expressly excluded States and their subdivisions from the definition of "employer." *Id.* § 3(d), 52 Stat. at 1060.

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[1] Exhibits not included in the appendix are referenced by their designation in the district court. The Police Department's exhibits are referenced as "Ex." followed by a number specifying the particular exhibit.

In 1938, the Wage and Hour Administrator promulgated regulations implementing the EAP exemptions from FLSA overtime liability. 3 Fed. Reg. 2518 (1938) (codified as amended at 29 C.F.R. Part 541). Congress had not yet enacted the APA but, in subsequent amendments to Part 541, DOL recognized its obligation to follow notice and comment procedures. *See, e.g.,* 19 Fed. Reg. 4405 (1954); 32 Fed. Reg. 7823 (1967); 36 Fed. Reg. 22,976 (1971).

Incrementally, Congress purported to expand the reach of the FLSA. In 1974, Congress, ostensibly under its power to regulate commerce, attempted to extend the FLSA to almost all 13.3 million employees of State and local governments by amending the definition of "employer" to include a "public agency." Fair Labor Standards Act of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (codified at 29 U.S.C. § 203(d)) (the "1974 Amendments").

The 1974 extension of the FLSA was enjoined and held unconstitutional by this Court as applied to "traditional governmental functions." *National League of Cities v. Usery,* 426 U.S. 833, 852 (1976). In 1985, in *Garcia,* the Court reversed *National League of Cities.* Although no record had been developed on the issue, the *Garcia* majority suggested that States and their subdivisions could rely on the national political process to protect their interests. *Garcia,* 469 U.S. at 552.

Congress responded to *Garcia* with limited amendments to the FLSA but did not discuss or amend the EAP exemptions. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2, 99 Stat. 787, 787-88 (codified at 29 U.S.C. § 207) (the "1985 Amendments"). DOL issued an advance notice of proposed rulemaking which requested comprehensive comments on the applicability of Part 541 to State and local governments. 50 Fed. Reg. 47,696, 47,696 (1985) (App. 87a). DOL extended the comment period until March 22, 1986, *see* 51 Fed. Reg. 2525, 2525 (1986), but in thirteen years has taken no further action with respect to the wide-ranging comments it received. *See, e.g.*, 60 Fed. Reg. 23,544 (1995).

On September 6, 1991, DOL instituted an APA notice and comment rulemaking to address only one narrow aspect of Part 541's "salary basis" test as applied to States and their subdivisions. 56 Fed. Reg. 45,824, 45,825 (1991) (App. 91a). DOL amended Part 541 with a provision later codified as 29 C.F.R. § 541.5d, acknowledging that there were grave problems in applying pre-existing Part 541 to State and local governments.

> [P]reviously existing rules and enforcement policy were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the express intent of Congress in the 1974 Amendments.
>
> . . . .
>
> [T]he regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees.

57 Fed. Reg. 37,666, 37,671, 37,672 (1992) (App. 92a). DOL refused to consider proposed changes to other provisions of Part 541. *Id.* at 37,674 (App. 92a).

In marked contrast, DOL did complete notice and comment rulemaking on 29 C.F.R. Part 553. The original Part 553 regulations, limited to safety forces, arose from congressional recognition in the 1974 Amendments that safety forces are unique. Following *Garcia*, DOL proposed to revise Part 553 to address all State and local government employees, acknowledging that the 1985 Amendments mandated that it promulgate new rules. 51 Fed. Reg. 13,402, 13,404 (1986). DOL's regulatory impact analysis for its expanded Part 553 regulations estimated that under *Garcia,* 13.8 million State and local employees would be subjected to the FLSA of which 6.9 million would be subject to the overtime provisions. 51 Fed. Reg. 25,710, 25,711 (1986) (App. 88a). After the 1985 Amendments, DOL estimated annual compliance costs to be $216 million. 52 Fed. Reg. 2012, 2030 (1987) (App. 89a). DOL based its analysis on "non-supervisory workers." *Id.* at 2028 (App. 90a).[2] When DOL promulgated the final version of new Part 553, it deferred suggested changes to the Part 541 exemption regulations: "In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for the Department to address this issue in developing a final rule for Part 553." *Id.* at 2019 (App. 89a).

3. The Proceedings Below

In 1992, plaintiff sergeants and lieutenants filed suit in the United States District Court for the District of Maryland alleging that they have been improperly designated as exempt EAP employees. On cross-motions for partial summary judgment on liability, the district court ruled that the sergeants and lieutenants are paid on a "salary basis" as defined by Part 541, but found disputed material issues of fact on whether they satisfied the "primary duty test." App. 24a, 33a-36a, 38a, 43a-44a, 54a. The court also rejected the Police Department's arguments that Part 541 and the FLSA were invalid as applied here.

The court held Part 541 is subject to APA notice and comment requirements. App. 51a. The court rationalized, however, that Part 541 met those requirements because

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[2] Congressional analyses in connection with the 1974 Amendments also had distinguished only between "supervisory" and "non-supervisory" employees. *E.g.*, H.R. Rep. No. 93-913, at 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837-38; *see also* S. Rep. No. 93-690, at 13 (1974); S. Rep. No. 93-300, at 15, 25 (1973).

Part 553 references Part 541, and State and local governments had an opportunity to comment on Part 553. App. 54a. Without citation to any authority, the court also stated that Congress intended the *pre-existing* Part 541 regulations to apply to State and local governments. App. 56a-57a.

The Police Department also argued that application of Part 541 to police management was arbitrary, capricious, and inconsistent with congressional intent. Police management expert di Grazia and economist Professor Simon Rottenberg provided supporting expert testimony uncontradicted by adverse experts. Their testimony was supported by admissions of DOL, among other evidence. *See* App. 94a. The Police Department also demonstrated that the results of applying Part 541 conflicted with congressional projections of the impact of extending FLSA coverage to State and local governments.

The court candidly explained its basis for declining to apply *Garcia*'s balancing test to the record:

> *Garcia* did not outline what is meant by "failings in the national political process" or "laws that unduly burden the States." 469 U.S. at 554, 556. In *[South Carolina v.] Baker*, the Court made note of this fact, yet again declining [*sic*] to define these terms. 485 U.S. at 512-13. Likewise, this Court is not in a position to attempt to define these terms.

App. 63a-64a.

The Police Department also argued that applying the FLSA and Part 541 to State and local police forces raises different issues – under the Commerce Clause, the Necessary and Proper Clause, the Guarantee Clause, and the Tenth Amendment – than when those laws are applied to other governmental workers, such as the substantially federally-funded transit workers in *Garcia*. Focusing primarily on the Commerce Clause argument, the court found that some officers' activities such as traveling on interstate highways and interacting with interstate buses and trains "have a significant impact on commerce" permitting federal imposition of overtime requirements for sergeants and lieutenants. App. 67a.

Recognizing the unprecedented factual record and unique validity arguments in this case, both the district court and the court of appeals certified under 28 U.S.C. § 1292(b) four controlling questions of law. App. 75a, 73a. Those questions are:

> 1. Whether the [DOL] regulations establishing criteria for exemption, 29 C.F.R. Part 541 (with the exception of 29 C.F.R. § 541.5d), are invalid as applied to States and their subdivisions because they were promulgated without adequate notice and comment as required by the [APA], 5 U.S.C. § 553?
> 2. Whether application of the DOL regulations establishing criteria for exemption, 29 C.F.R. Part 541, to law enforcement agency management by States and their subdivisions is arbitrary, capricious, and inconsistent with congressional intent?
> 3. Whether application of the [FLSA] and DOL's implementing regulations to States and their subdivisions is a result of a failure in the national political process that places an undue burden on States and their subdivisions within the meaning of [*Garcia*]?
> 4. Whether application of the [FLSA] and DOL's implementing regulations to police management by States and their subdivisions is constitutional?

App. 75a-76a.

The Fourth Circuit held that *Auer* "foreclosed" consideration of the merits of the first certified question. App. 4a-5a. To the extent the Fourth Circuit acknowledged that *Auer* is inapplicable to notice and comment challenges, the court abandoned the rationales offered by the district court and, instead, relied upon the fact that

Part 541 was subject to notice and comment procedures in the 1940s, long before the regulations applied in the public sector. App. 5a & n.*. The court viewed any further notice and comment challenge as "premature" under *Auer*. App. 5a. The Fourth Circuit held that the second certified question "is answered by the Supreme Court's decision in *Auer*." App. 6a. The court did not address bases to distinguish *Auer* on either of the administrative law issues.

On the *Garcia* balancing question, the Fourth Circuit held that the evidence was "insufficient to demonstrate a failure in the national political process." App. 7a. The only evidence the Fourth Circuit suggested might be sufficient to demonstrate a *Garcia* defect consists of "evidence to suggest that [Baltimore City] is unable to petition DOL to change its regulations; to lobby Congress to amend the FLSA or elect new congressmen who might do so; or to combine its efforts with other cities and states in order to increase its resources and bargaining power." App. 7a.

After oral argument, the court of appeals held this case in abeyance pending its disposition of *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir.), *cert. denied*, 119 S. Ct. 607 (1998). In *West*, the County presented a constitutional argument, based only on the Tenth Amendment, which called for the court to recognize that *Garcia* had been undermined by subsequent decisions of this Court. The *West* court rejected the Tenth Amendment challenge presented in that case, holding "that *Garcia* controls the disposition of that issue and that any decision to revisit *Garcia* is not ours to make." 137 F.3d at 760; *see id.* at 757. When the Fourth Circuit then addressed the fourth certified question in the case at bar, it invoked *West* as foreclosing any constitutional challenge to the FLSA despite the fact that the case here relies on additional constitutional bases never addressed in *West* or *Garcia*. App. 7a.

The Fourth Circuit declined to reconsider its reasoning on rehearing or rehearing *en banc*. App. 79a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

1. The Court Invited this Petition in *Auer* and Post-*Auer* Confusion Among the Lower Courts Emphasizes the Importance of Resolving the Issue Now

In *Auer*, this Court virtually invited this case as a vehicle to address defects in the application of Part 541 to State and local government employers. Although *Auer* was resolved by interpreting a provision of Part 541, *see* 519 U.S. at 459-63, the Court addressed in *dicta* a challenge to the validity of Part 541, not addressed by either of the lower courts, that the application of Part 541 to local police employees was arbitrary and capricious. This Court explained, however, that a challenge on notice and comment grounds presented a different question that warranted consideration:

> [C]omplaints about the failure to amend the disciplinary-deduction rule cannot be raised in the first instance in the present suit. A court may certainly be asked by parties in respondents' position to disregard an agency regulation that is contrary to the substantive requirements of the law, or one that appears on the public record to have been issued in violation of procedural prerequisites, such as the "notice and comment" requirements of the APA, 5 U.S.C. § 553.

519 U.S. 459. This case provides the appropriate vehicle for the Court to finally address on the merits DOL's application of pre-existing Part 541 to State and local government employers where DOL never addressed the comments of such employers that pre-existing Part 541 would produce results in that setting that are arbitrary, capricious, and inconsistent with congressional intent.

DOL never explained why it is appropriate to apply the pre-existing Part 541 regulations in this context and, in fact, DOL has conceded that the regulations are out of date and ill suited for application in the public sector. For more than thirteen years DOL has had an open rulemaking proceeding to address these issues during which time the courts have faced a "veritable flood of post-*Garcia* litigation against public employers," 519 U.S. at 459, while DOL has taken no action to resolve the problems (except for the promulgation of 29 C.F.R. § 541.5d dealing with one narrow aspect of the salary basis test).

The need for this Court to address the issue identified in *Auer* has grown stronger in light of the confusion among the lower courts as to the meaning and scope of this Court's *dicta* in *Auer*. In this case, the Fourth Circuit refused to consider the Police Department's challenges to the validity of the Part 541 regulations – including the notice and comment challenge – because the Police Department had not previously petitioned DOL to institute a rulemaking to address those issues. App. 4a-5a. Both the Third and Seventh Circuits likewise have emphasized the *Auer dicta* that challenges to regulations must first be raised before an agency and may not be raised in defense to an enforcement action. *See Balgowan v. New Jersey*, 115 F.3d 214, 218-20 (3d Cir. 1997); *Bowman v. City of Indianapolis*, 133 F.3d 513, 514, 517-18 (7th Cir. 1998). Authorities within the Eleventh Circuit describe *Auer* as foreclosing challenges to the validity of regulations. *See Boyd v. Glickman*, 12 F. Supp. 2d 1261, 1270 (M.D. Ala. 1998) (citing *Auer* as bar to considering validity of non-FLSA rules on the basis that it was arbitrary not to conduct a new rulemaking in light of post-promulgation developments); *Arrington v. City of Macon*, 973 F. Supp. 1467, 1471 & n.6 (M.D. Ga. 1997) (citing *Auer* as bar to considering a challenge to Part 541 that it was arbitrary not to conduct a new rulemaking and also refusing to consider notice and comment challenge).

In contrast, the Ninth Circuit holds that not all challenges to the validity of regulations are foreclosed by *Auer*, only certain allegations that a regulation is arbitrary and capricious. *See Hernandez v. City of Santa Ana*, 134 F.3d 377 (Table), 1998 WL 23207, at **1-**2 (Nos. 93-56624 & 93-56713) (9th Cir. 1998) (reaffirming *Service Employees Int'l Union, Local 102 v. City of San Diego ("SEIU")*, 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, 516 U.S. 1072 (1996), because "*Auer* dealt with an attack on a regulation as being arbitrary and capricious" while "*SEIU* dealt with the complete absence of decision-making as well as [DOL's] own admission that what it had previously done was inappropriate").

In two cases in which the District of Columbia Circuit cited *Auer*, the court nonetheless considered challenges to the validity of agencies' regulations. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252-53 (D.C. Cir. 1998) (addressing challenge to validity of informal regulations); *Cassell v. FCC*, 154 F.3d 478, 481, 484 (D.C. Cir. 1998) (addressing on its merits a notice and comment challenge to extension of pre-existing regulations). Although citing *Auer*, the Fifth Circuit considered on judicial review of agency adjudication the issue of whether a DOL regulation "is rational, reasonable, and in accordance with legislative purpose" but declined to resolve the issue due to waiver. *See Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 304, 307-08, 311-14 (5th Cir. 1998) (per curiam). Similarly, authority within the Federal Circuit cited *Auer* yet also addressed on the merits challenges to administrative regulations. *See Adams v. United States*, 40 Fed. Cl. 303, 304, 306, 308 (Fed. Cl. 1998).

This growing division of authorities is not limited to the FLSA context. *E.g., Apfel*, 156 F.3d at 1247, 1251-52 (challenge by private parties to Social Security Administration's allocation of coal industry retirees to companies for the payment of benefits); *Cassell*, 154 F.3d at 480, 483 (challenge by private parties to FCC "finder's preferences" rules); *Fort Hood Barbers Ass'n*, 137 F.3d at 304 (challenge by private parties to DOL determination under McNamara-O'Hara Service Contract Act); *Boyd,* 12 F. Supp. at 1263 (challenge by private parties to Department of Agriculture rules regarding classification of commodities). The division in authorities regarding the meaning of *Auer* unsettles general administrative law.

2. This Case Presents the First Comprehensive Record Addressing the Balancing Test Adopted in *Garcia* and Provides a Vehicle for the Court to Demonstrate that Such a Balancing Test Exists in Practice and Not Merely in Theory

In *Garcia,* the majority suggested that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure" and "in the workings of the National Government itself." 469 U.S. at 550, 552. The new standard prescribed was that "[a]ny substantive restraint on the exercise of [the] Commerce Clause . . . must be tailored to compensate for possible failings in the national political process," a process which insures "that laws that unduly burden the States will not be promulgated." *Id.* at 554, 556. This Court has characterized the test as a balancing analysis. *Printz v. United States,* 117 S. Ct. 2365, 2383 (1997) (citing, *inter alia, New York v. United States,* 505 U.S. 152, 155-56 (1992)). One of the most important current issues to States and local governments and the preservation of constitutional federalism is clarification of the *Garcia* "balancing" test, which was formulated on a record devoid of evidence on the actual workings of the national political process and undue burdens imposed upon States. The comprehensive factual record here on the relevant process issues presents the best vehicle for this Court to demonstrate that *Garcia's* balancing test gives constitutionally appropriate recognition to the sovereignty of States and requires lower courts to balance evidence rather than invoke *Garcia* as an absolute bar.

In this case, the Police Department presented the testimony of two experts on federalism and the national political process: Congressman John W. Erlenborn, who served on the House of Representatives' committee with jurisdiction over labor matters, including the FLSA from 1966 to 1985; and the University of Virginia's Professor A.E. Dick Howard, an internationally renowned scholar of federalism. Both experts, unopposed by other experts in this case, concluded that failings in the national political process imposed undue burdens upon States and their subdivisions. App. 77a, 110a, 131a. Congressman Erlenborn discussed changes in the national political process and concluded that "the cumulative effect of changes in the federal legislative and political processes since the 1960's constitute a substantial failing and defect in those processes resulting in an undue burden upon state and local governments." App. 110a. Professor Howard reached the same conclusion as Congressman Erlenborn. App. 131a. He added: "State and local governments have been crippled in their ability to convey to Congressmen and their staffs the consequences of their legislative decisions on state and local governments. I am not commenting on policy, but on defects in process." App. 131a. The expert testimony was supported by a large quantity of documentary evidence. App. 96a-98a (list of pertinent exhibits).

The district court's difficulty in applying the *Garcia* balancing test lay in the absence of further clarification of the phrases "failings in the national political process" or "laws that unduly burden the States." 469 U.S. at 554, 556; *see* App. 63a-64a. *Garcia* has been cited in 617 cases (according to a May 3, 1999 Westlaw Keycite request), including 30 in this Court (counting majority and dissenting cites), yet no case has been found applying the *Garcia* balancing test to invalidate or even limit the congressional Commerce Clause invasion of state sovereignty; this fact suggests that *Garcia* is misperceived by the lower courts as a bar, not as a balancing test. Consequently, there is "much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role" in federalism cases. *Lopez,* 514 U.S. at 575 (Kennedy, J., concurring).

The record developed in this case demonstrates that States and local governments were impotent under the national political process to preclude imposition of the FLSA. Numerous changes in the political process severely curtailed the ability of States to participate effectively in the national political process.

No other case heard by this Court has presented a record so complete on the test *Garcia* articulated, namely, whether "failings in the national political process" have resulted in "laws that unduly burden the States." 469 U.S. at 554, 556. If *Garcia* permits judicial enforcement of federalism limitations, the record here exhorts remand for a balancing of the evidence under the proper standard. The Court should clarify that *Garcia* still requires the Court to serve as final arbiter of the Constitution.

3. This Case Presents Issues that are Matters of Extreme National Importance

a. The FLSA Imposes Billions of Dollars in Costs to State and Local Governments Nationwide

A ruling for the Police Department on any of the underlying issues presented could protect the decisions of State and local officials nationwide who are called upon to determine whether employees are exempt under DOL regulations developed in a different era for the private sector only. Such a ruling would preclude the needless additional drain of hundreds of millions of dollars of tax revenues from State and local jurisdictions. Apart from the staggering compliance costs, State and local governments also face enormous litigation expenses due to the number of unresolved problems in applying the FLSA and its implementing regulations.

This case is also of great national importance due to the extraordinary costs imposed upon States and local governments by unfunded mandates, many, including the FLSA, purportedly enacted under the Commerce Clause. The Advisory Commission on Intergovernmental Relations ("ACIR") collected many cost estimates. *Federally Induced Costs Affecting State and Local Governments,* (Pub. M-193, 1994) ("ACIR 1994"). ACIR reports that two different surveys estimated the cost to local governments of the FLSA in FY 1993 to be $474 million.[3] ACIR 1994 at 13. In contrast, DOL projected in 1987 the *ten year* cost of the FLSA for State *and* local governments to be only $1.5 billion. *Id.* at 12 & 18 n.2.

There have been extraordinary costs attendant to imposing the FLSA on State and local governments, including either liquidated damages (up to twice compensatory damages) or prejudgment interest. *See Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697 (1945). DOL concedes "the flood of lawsuits" against State and local governments. 57 Fed. Reg. at 37,669. A Westlaw search indicates 129 Part 541 overtime cases and 207 extended work-week cases under 29 U.S.C. § 207(k) against State and local governments. These reported and unreported FLSA cases do not include many settlements, such as the State of California's 1996 settlement of a $550 million FLSA case. *Parr v. State of California,* Nos. CIV-S-92-1115, CIV-S-92-1493, CIV-S-92-1544, CIV-S-94-1211 (E.D. Cal. May 24, 1996) (unpublished); *Settlement OKd in Lawsuit Over State IOUs,* L.A. Times, May 30, 1996, at A16. The City of Chicago estimated potential exposure in one FLSA § 207(k) case to exceed $20 million, *see* Pet. for Writ of Cert. at 13, *City of Chicago v. Alex,* 63 U.S.L.W. 3349 (U.S.

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[3] Although the methodology for these estimates has been criticized, the point is not the precision of the estimates but that the costs far exceed those anticipated by Congress. Major discrepancies should be considered under *Garcia*'s balancing test.

Oct. 19, 1994) (No. 94-704), which it settled for a sum in excess of $13.5 million after the Court declined to review the case. *Alex,* 513 U.S. 1057 (1994) (denying certiorari). Chicago also settled other consolidated FLSA overtime cases brought by some of its police sergeants, lieutenants, and captains for a sum in excess of $6 million. *See Tracy v. City of Chicago,* No. 95c-5714 (N.D. Ill. 1998). Ignoring voluntary compliance costs, it is likely that total litigation costs, judgments, and settlements alone have exceeded DOL's 1987 estimate. Here, the Police Department has undertaken substantial expense, involving six experts, hundreds of exhibits, and fully briefed arguments on these certified issues to avoid a several month trial which will not improve the record on the certified issues.

Because these issues of great national importance are fully developed and preserved, the record is the most comprehensive ever compiled on these issues, and consideration now would avoid extraordinary inconvenience and cost to Petitioners, as well as numerous other litigants, the Court should grant the Petition.

b. DOL Did Not Comply with APA Notice and Comment Requirements So That Part 541 May Not Be Applied to State and Local Government Employers

Other than improperly relying upon *Auer* to foreclose consideration of the Police Department's notice and comment challenge to Part 541, the Fourth Circuit's only other basis for not addressing the issue was its assertion that the Police Department "concedes, as it must, that DOL complied with all necessary notice and comment requirements when Part 541 was promulgated." App. 5a. Neither the panel nor the *en banc* court ever identified the source of this purported concession. The Police Department presented exhaustive argument to the contrary. Appellant's Br. 19-25; Reply Br. 8-18. When Part 541 was promulgated in the 1940s and 1950s, *see* app. 5a n.*, the FLSA did not apply to the public sector. Consequently, the Police Department (as well as the entire class of State and local governments) had no meaningful notice or opportunity to be heard at that time. When the FLSA was extended to encompass State and local governments, DOL never completed any new notice and comment proceeding before applying then thirty-to-forty year old regulations designed for the private sector alone. At minimum, DOL was required to promulgate an APA valid rule announcing that the private sector Part 541 regulations would be applied unchanged to State and local governments.

The absence of any APA valid notice, opportunity to comment, and DOL response to comments filed is the significant distinction between the first two certified issues. This Court has recognized that there is no excuse for an agency to fail to take such minimal action. *E.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 315-16 (1979); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972). Consistent with that obligation, in 1985, DOL initiated a new rulemaking proceeding in order to comprehensively review Part 541 for application to State and local governments. 50 Fed. Reg. 47,696 (1985). After receiving numerous comments from State and local governments proposing comprehensive modifications,[4] DOL has not acted on the matter for more than thirteen years, although it repeatedly promises to do so.

In the interim, DOL repeatedly conceded the problems. As early as 1987, DOL adopted a non-enforcement policy with respect to Part 541's "salary basis" test. *See SEIU*, 60 F.3d at 1357. DOL acknowledged that "the regulatory requirements adopted before Congress extended

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[4] The Fourth Circuit's order dated July 3, 1997, took "judicial notice of the fact that comments were filed with [DOL] by some states and local governments." Many of those comments are in the record as exhibits to the Police Department's motion for judicial notice. Examples were filed as trial court exhibits. Ex. 36; Ex. 52.

FLSA coverage to State and local governments . . . were out of harmony with the intent of the statute." 57 Fed. Reg. at 37,672. Subsequently, DOL acknowledged that "the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employees." 59 Fed. Reg. 57,129, 57,130 (1994). "Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary." *Id.; see* 64 Fed. Reg. 21,500, 21,501 (1999) ("the regulations are still in need of updating and clarification").

Despite DOL's acknowledgments, it has never completed the pending notice and comment rulemaking. In 1974 when the FLSA was extended, DOL did not initiate a rulemaking on Part 541. In its 1974 rulemaking on Part 553, DOL deferred consideration of comments on the need to revise Part 541 until Part 541 was reissued. 39 Fed. Reg. 44,142 (1974). DOL never reissued Part 541. Following *Garcia*, DOL initiated another rulemaking on Part 553. 51 Fed. Reg. 13,402 (1986). Once again State and local governments' Part 553 comments explained the need to revise Part 541 but DOL deferred consideration to the then- and still-pending Part 541 rulemaking. 52 Fed. Reg. at 2023. When DOL adopted a new regulation addressing one narrow issue, 29 C.F.R. § 541.5d, it again declined to consider comments from State and local governments identifying problems that required comprehensive revision of Part 541. 57 Fed. Reg. at 37,674 (App. 92a).

The time is ripe to review DOL's failure to explain how pre-existing Part 541 may be extended to State and local government employers and serve as a rule of decision in cases such as this one in light of (i) DOL's repeated deferral of consideration of that issue in completed rulemaking proceedings, (ii) DOL's failure to complete the rulemaking proceeding to which it repeatedly defers, and (iii) DOL's acknowledgment that Part 541 is out of date. The Court has an obligation to address that issue before the imposition of liability because "[i]n order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler,* 441 U.S. at 301. Nothing would be gained by requiring the Police Department to formally petition DOL to institute a rulemaking duplicative of the one pending since 1985. *See* 64 Fed. Reg. at 21,501 (referencing rulemaking proceeding on Part 541 while noting no final action received on comments received in 1986). Such a petition "would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Weinberger v. Salfi,* 422 U.S. 749, 765-66 (1975).

c. DOL's Failure to Comply with Notice and Comment Requirements is Compounded by the Fact that Applying Part 541 to State and Local Government Employers Produces Results which are Arbitrary, Capricious, and Contrary to Congressional Intent

The Fourth Circuit held that the second certified question was precluded by *Auer.* App. 6a. *Auer* is not dispositive for five reasons.

First, the portion of *Auer* purporting to limit judicial consideration of certain administrative law issues is *dicta. Auer* considered whether a police department's suspension without pay of police managers who otherwise qualified for the FLSA's EAP exemptions resulted in a loss of the exemptions. The Supreme Court resolved that issue, as did both lower courts, by interpreting DOL's Part 541 regulations. *Auer,* 519 U.S. at 459-63. There was no need for the Court to address the validity of the regulations. *See Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 393 (1995) (characterizing statement in prior opinion as *dicta* when "it develops, later in the opinion, that the Court would not have had to consider that question anyway"). Consequently, *Auer's* statement purporting to require challenges to be raised in a petition directed to

DOL is *dicta,* not controlling authority that "foreclosed" consideration of the Police Department's APA issues. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 277 (1994).

Second, the *Auer dicta* creates a conflict with numerous prior decisions that were not overruled or even cited in *Auer. E.g., Brown v. Gardner,* 513 U.S. 115 (1994) (invalidating rule on judicial review of agency adjudication rather than on review of rulemaking proceeding); *Chrysler,* 441 U.S. 281 (same). The *Auer dicta* also runs contrary to settled ripeness doctrine which generally requires that an agency's action's "effects [are] felt in a concrete way by the challenging parties" before courts will hear a matter so as to avoid courts' "entangling themselves in abstract disagreements over administrative policies." *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 118 S. Ct. 1665, 1670 (1998) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967)).

Third, this Court has not viewed itself bound by the *Auer dicta.* Less than one week after issuing *Auer,* this Court unanimously held invalid regulations challenged by the defendant in an enforcement action, despite the defendant's failure to petition the agency to institute a new rulemaking. *See Dunn v. CFTC,* 519 U.S. 465 (1997). This Court continues to do so. *E.g., Regions Hosp. v. Shalala,* 118 S. Ct. 909 (1998); *United States v. O'Hagan,* 117 S. Ct. 2199, 2214-19 (1997); *see also Atlantic Mut. Ins. Co. v. Commissioner,* 118 S. Ct. 1413, 1418 (1998). Thus, the Fourth Circuit's reading of *Auer* creates a conflict with this Court's continuing practice.

Fourth, neither *Auer* nor the panel addressed an exception to any obligation to seek relief initially from DOL. It would be a futile formality to petition DOL to initiate a rulemaking on Part 541 because DOL already has such a rulemaking under way. *See* pages 6, 7, 21, 22 *supra.*

Fifth, Auer's purported limitation on an "arbitrary and capricious" defense did not address the situation where, as here, the defense also raises APA challenges authorized by *Auer*. The Police Department raises both "notice and comment" and "inconsistent with congressional intent" issues, not simply "arbitrary and capricious" issues. *Auer* purports to limit consideration of only some "arbitrary and capricious" challenges. 519 U.S. at 459. Where such issues are joined, the Supreme Court has considered all the issues. *See O'Hagan,* 117 S. Ct. at 2214-19 (considering whether regulation was arbitrary and capricious, as well as whether it was inconsistent with congressional intent).

The evidence shows that Congress intended approximately half of all State and local government employees would not be subject to overtime requirements while Part 541 results in substantially fewer exemptions. The Police Department also compared the regulatory provisions applicable to federal government employees with the provisions of Part 541 and noted the divergence of approach. The factual record developed on this issue includes the declaration, app. 133a, and deposition of a nationally known police management expert who reviewed Part 541 section-by-section and testified to its factual inapplicability to police management. This case presents the vehicle for the Court to make a holding on a factual record and with the benefit of adversarial briefing on the matter addressed prematurely in *Auer*.

d. Balancing the Evidence of Record Pursuant to the Standards Adopted in *Garcia* Demonstrates That Application of the FLSA Imposes an Undue Burden Flowing from Failures in the National Political Process

As explained above, the record in this case is replete with evidence that failings in the national political process imposed undue burdens upon States and their subdivisions. For example:

- Congressman Erlenborn testified that "State and local governments lack the necessary resources and lobbying staffs . . . to contact and effectively influence the greatly expanded groups of key lawmakers and their staffs." App. 104a. Professor Howard noted that "States and local governments have no mechanism to compete [with other special interest groups] financially." App. 127a.
- Congressman Erlenborn testified that "the cumulative effect of changes in the federal legislative and political processes since the 1960's constitute a substantial failing and defect in those processes resulting in an undue burden upon state and local governments." App. 110a. Professor Howard agreed. App. 124a-25a, 130a.
- Professor Howard testified that changes in the federal legislative and political processes "constitute a substantial failing and defect in those processes resulting in an undue burden upon state and local governments," the result of which is "effectively to preclude state and local governments from accomplishing their goals or protecting their interests in the federal legislative and political processes." App. 131a.

In *Garcia,* this Court preserved a judicial role to limit Congress' exercise of its commerce clause powers where there have been failings in the national political process. 469 U.S. at 554. Where, as here, a lower court is presented with evidence of such failings, it is error to abdicate the function *Garcia* reserved.

e. Application of the FLSA and DOL's Implementing Regulations to Police Management is Unconstitutional

1) Congress Lacks Delegated Power to Extend the FLSA to State and Local Police Management

Applying the FLSA to the State and local police forces exceeds the commerce power delegated to Congress. There remains an area of local activity that has such indirect effect on interstate commerce as to fall beyond the reach of national power. This Court held that a view of the Commerce Clause that recognizes no "limitation on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign" must be rejected. *Lopez,* 514 U.S. at 564. "[T]he proper test requires an analysis of whether the regulated activity '*substantially* affects' interstate commerce." *Id.* at 559 (emphasis added).

Prior Commerce Clause cases are distinguishable; the Court has never held that the FLSA applies in this context. Prior cases do not support the view that Congress can regulate a class of organizations[5] that, *by definition,* exist and operate wholly within one State without some further showing that the activities of the class of organizations have a "substantial effect on interstate commerce." *United States v. Darby,* 312 U.S. 100, 119-20 (1941).

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[5] At times, this Court has upheld Commerce Clause regulation even when the individual's activity has no perceptible interstate effect as long as the activity of the regulated *class* affects interstate commerce. *E.g., Fry v. United States,* 421 U.S. 542, 547 (1975); *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). Although it may not be necessary to resolve the issue here (because local police forces *as a class* do not "affect commerce" in any cognizable fashion), the Police Department maintains that this doctrine is in error, at least in this context.

The activities of police forces that "affect commerce" in any of the ways the Supreme Court has previously recognized are trivial, if they exist at all. The district court relied upon the fact that some officers traveled on interstate highways and interacted with interstate buses and trains. App. 67a. Such marginal and tangential activities by a *local* police organization do not have the required substantial effect on interstate commerce.

Congress cannot answer for the Court whether the activities it seeks to regulate have a "substantial effect on interstate commerce." Congressional definition of a purely intrastate activity as one with an effect on interstate commerce does not make it so. *See Lopez,* 514 U.S. at 557 n.2. Congress attempted, nonetheless, to follow that approach with the FLSA, despite this Court's warning that such an approach misread precedent. *Compare Maryland v. Wirtz,* 392 U.S. 183, 196 n.27 (1968) (rejecting notion Congress could "declare a whole State an 'enterprise' affecting commerce") *with* 1974 Amendments, Pub. L. No. 93-259, § 6(4)-(5), 88 Stat. 55, 59-60 (deeming public employees to be engaged in activities affecting commerce).

State and local governments are not commercial enterprises. Their activities, particularly police functions, are clearly not "performed for a business purpose," and their activities do not invariably substantially affect interstate commerce. The police departments of States and local governments are not "enterprises" "perform[ing] [activities] for a business purpose" and police officers are not "engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce." The FLSA no longer contains a statutory jurisdictional provision; the FLSA thus suffers from the same statutory flaw identified in *Lopez.*

2) Necessary and Proper Clause

The Police Department also argues that the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, precludes the application of the FLSA in this case. In *Printz,* this Court explained that the Necessary and Proper Clause acted to limit congressional power rather than expand it. 117 S. Ct. at 2379. Congressional encroachment upon local prerogatives is neither necessary nor proper under the Constitution. *See Hopkins Fed. Sav. & Loan Ass'n v. Cleary,* 296 U.S. 315, 338-39 (1935).

3) Guarantee Clause

In *New York* and *Printz,* the Court recognized the guarantee clause as a basis for protecting "dual sovereignty." *New York,* 505 U.S. at 184-86; *Printz,* 117 S. Ct. at 2376-77.

> [National regulation of the wages States and their subdivisions pay to police officers] appears to violate the guarantee clause. [U.S. Const. art. IV, § 4]. Police officers enforce the laws of their state, exercising substantial discretion over what conduct constitutes a crime and when to effect an arrest. . . . Just as the citizens of a republican government decide whether to enact a law, those citizens should decide how vigorously to enforce the law. Federal regulation of the wages paid police officers undermines this republican power by affecting both the number of police officers employed by a state and their qualifications.

Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century,* 88 Colum. L. Rev. 1, 57 (1988) (footnotes omitted). This Court has cited this article with favor. *New York,* 505 U.S. at 157; *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

A holding that the guarantee clause places the wages of police beyond the reach of congressional regulation does not violate *Garcia*. *Garcia* addressed mass transit workers (not police) and the Tenth Amendment (not the Guarantee Clause). Such a holding would have little impact on the FLSA – which already exempts governors, legislators, and judges from regulation – and would provide the "bright line" rule lacking in *Garcia*.

4) In Light of This Court's Recent Decisions, *Garcia* Is No Longer Good Law

The different factual setting in this case from that in *Garcia* suggests either that there is no controlling authority governing this case, that the *Garcia* test should be articulated in a way that lower courts can understand and apply, or that *Garcia* should be overruled and replaced by the structural view of federalism relied upon in this Court's more recent cases. *See, e.g., New York,* 505 U.S. 144; *Printz,* 117 S. Ct. 2365. Those decisions cast doubt upon *Garcia*'s vitality. This case presents the Court with a prime opportunity to apply that new jurisprudence to the FLSA itself.

First, *Garcia* relied upon a premise – that the interests of States would be adequately protected by "the structure of the Federal Government itself," *Garcia,* 469 U.S. at 550 – which was not based on record evidence and, as demonstrated by the record here, is incorrect. As recently noted by a constitutional scholar now serving as "Associate Counsel to the President, advising the White House on matters of constitutional law and policy": "[T]he protection of the states through the political process in Washington is dead, or if not dead, is seriously ill." William Marshall, *American Political Culture and the Failures of Process Federalism,* 22 Harv. J. L. & Pub. Pol'y 139, 139 n.*, 144 (1998).

Second, this Court has undermined the related premise that a State's congressional delegation represents the State. Since *Garcia,* the Court has held that the Members of Congress "owe primary allegiance *not* to the people of a State, *but to the people of the Nation.*" *U.S. Term Limits,* *Inc. v. Thornton,* 514 U.S. 779, 803 (1995) (emphasis added).

Third, *Garcia*'s political process rationale itself should invalidate application of the FLSA on these facts. One authority recently noted that a legislative case study indicates that "states and localities succeeded only when they allied with others in a coalition." Paul Posner, *The Politics of Unfunded Mandates, Whither Federalism*? 81 (1998). Congress politically isolated the States at the time of the 1974 Amendments to the FLSA, having stripped them of their natural allies, thereby preventing proper functioning of the national political process.

If *Garcia* is interpreted to permit the extension of the FLSA and Part 541, it should be overruled.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRATERNAL ORDER OF POLICE, LODGE 3, *ET AL.*,

Plaintiffs-Appellees,

v.

BALTIMORE CITY POLICE DEPARTMENT; THOMAS C. FRAZIER,

Defendants-Appellants,

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; THE CITY OF NEW YORK; SECRETARY OF LABOR,

Amici Curiae.

No. 97-1081

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-92-1066-B)

Argued: July 16, 1997

Decided: September 23, 1998

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and FOX, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: John D. Maddox, ARTER & HADDEN, Washington, D.C., for Appellants. Edward Dean Sieger, Senior Appellate Attorney, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae Secretary. Michael Lawrence Marshall, SCHLACHMAN, BELSKY & WEINER, P.A., Baltimore, Maryland, for Appellees. **ON BRIEF:** Thomas H. Odom, Terri L. Bowman, ARTER & HADDEN, Washington, D.C.; Otho M. Thompson, City Solicitor, James S. Ruckle, Jr., Associate City Solicitor, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for Appellants, J. Davitt McAteer, Acting Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, Nathaniel I. Spiller, Deputy Associate Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Amicus Curiae Secretary. Henry W. Underhill, Jr., Donna Clemons-Sacks, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, Washington, D.C.; Renee R. Christina, Greenville, South Carolina, for Amicus Curiae IMLA. Paul A. Crotty, Corporation Counsel of the City of New York, Kristin M. Helmers, Timothy J. O'Shaughnessy, New York, New York, for Amicus Curiae City.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

MURNAGHAN, Circuit Judge:

Appellant, Baltimore City Police Department (City), appeals the district court's denial of its motion for summary judgment in a suit brought by the Fraternal Order of Police and various City police sergeants and lieutenants (collectively, Officers), to collect overtime compensation they believe they are entitled to under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 207-219. Following summary judgment, the district court certified four questions of law pursuant to 28 U.S.C. § 1292(b), and we granted the City permission for an interlocutory appeal.

I.

The first certified question is:

> Whether Department of Labor (DOL) regulations establishing criteria for exemption, 29 C.F.R. Part 541 (with the exception of 29 C.F.R. § 541.5d) are invalid as applied to States and their subdivisions because they were promulgated without adequate notice and comment as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553?

The FLSA mandates that covered employers pay overtime compensation to eligible employees at a rate of one and a half times the employee's regular rate of pay for each hour worked. *See* 29 U.S.C. § 207(a)(1). The Act expressly excludes from that requirement any employee who works in a "bona fide executive, administrative, or professional capacity," as those terms are "defined and delimited" by the Secretary of Labor. *See* 29 U.S.C.

§ 213(a)(1). In 1938, DOL promulgated regulations, 29 C.F.R. Part 541, to define the duties that qualify for executive, administrative, or professional exemption. The exemption was further defined during the 1940s, with DOL's creation of the "salary basis" and "primary duty" tests, both of which provide standards for the application of Part 541. *See* 14 Fed. Reg. 7705-07, 7730-40 (1949).

As originally enacted, the FLSA applied only to private sector employers. However, in 1974, Congress amended the Act to include within the definition of a covered employer any "public agency," thereby making the FLSA applicable to a broad range of state and local government employers. *See* 29 U.S.C. § 203(d). The 1974 amendments were initially declared unconstitutional by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), on the ground that they encroached upon "tradional governmental functions," such as police activities, that are beyond the reach of the federal commerce power, *id.* at 852. But nine years later, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court overruled *National League of Cities*, and Congress reinstated the extension of the FLSA to state and local governments.

In the case at bar, the City contends that Part 541 is invalid because DOL failed to undertake notice and comment rulemaking, pursuant to the APA, 5 U.S.C. § 553(b)-(d), following the extension of the FLSA to public agencies. We believe the City's argument is foreclosed by the Supreme Court's recent decision in *Auer v. Robbins*, 117 S.Ct. 905 (1997). There, the St. Louis Board of Police Commissioners argued that DOL acted arbitrarily and capriciously in failing to revisit rulemaking with respect to the FLSA's salary-basis test in the wake of *Garcia*. *See id.* at 908. However, the Court rejected the claim as premature, since the Commissioners had not first petitioned DOL to undertake amendatory rulemaking, as required by § 553(e) of the APA. *See id.* at 910. The Court held that "complaints about the failure to amend the disciplinary-deduction rule cannot be raised in the first instance in the present suit. . . . The proper procedure for pursuit of respondents' grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706." *Id.*

We believe the present case is indistinguishable from *Auer*. While it is true that *Auer* recognized an exception from § 553(e)'s petition-filing requirement in cases where the challenge pertains to a failure to comply with notice and comment procedures, *see id.*, the City concedes, as it must, that DOL complied with all necessary notice and comment requirements when Part 541 was promulgated.* In light of that concession, it is clear that the City's challenge, although phrased in terms of notice and comment, is really an attack on DOL's failure to revisit rulemaking in the wake of *Garcia*. Therefore, because the record does not reveal that the City has petitioned DOL to undertake amendatory rulemaking, we conclude that the City's challenge is premature.

---

* *See* 12 Fed. Reg. 6896 (1947) (providing notice); 14 Fed. Reg. 5573 (1949) (same); 14 Fed. Reg. at 7705 (subpart A regulations); 14 Fed. Reg. at 7730 (subpart B regulations).

II.

The second certified question is:

> Whether application of Part 541 to law enforcement management by States and their subdivisions is arbitrary, capricious, and inconsistent with congressional intent?

This inquiry, like the first, is answered by the Supreme Court's decision in *Auer*. *See* 117 S.Ct. at 910. We therefore conclude that the City's challenge is premature.

III.

The third certified question is:

> Whether application of the FLSA and Part 541 to States and their subdivisions is a result of a failure in the national political process that places an undue burden on States and their subdivisions within the meaning of *Garcia*?

The City maintains that application of the FLSA to state and local law enforcement agencies results from a failure of the national political process and places an undue burden on those entities in violation of *Garcia*. *See* 469 U.S. at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated."); *see also South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment. . . . ").

We find the City's contention to be without merit. Although the City called two experts who testified that the power of political action committees has limited the City's ability to bring about change in the structure and application of the FLSA, we think that evidence is insufficient to demonstrate a failure in the national political process. The City presented no evidence to suggest that it is unable to petition DOL to change its regulations; to lobby Congress to amend the FLSA or elect new congressmen who might do so; or to combine its efforts with other cities and states in order to increase its resources and bargaining power. We therefore agree with the district court that the City has no claim under *Garcia*.

IV.

The fourth certified question is:

> Whether application of the FLSA and Part 541 to state and local police management is unconstitutional?

The present case was initially held in abeyance pending our decision in *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998). In *West*, we held that, in light of *Garcia*, inferior state and federal courts are precluded from holding the FLSA unconstitutional because it has been extended to include state and local governments. *See id.* at 760. In light of that holding, we answer the fourth certified question in the negative.

V.

In summary, our answers to the four certified questions are as follows:

First and Second questions – premature, without prejudice to administrative remedies;

Third and Fourth questions – no.

The case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, ET AL. *
*
v. *
BALTIMORE CITY POLICE DEPARTMENT, ET AL. * CIVIL NO. B-92-1066
*

* * *

MEMORANDUM OPINION

Presently pending before the Court are plaintiffs' Partial Motion for Summary Judgment and defendant's Motion for Partial Summary Judgment. This lawsuit was filed by the Fraternal Order of Police Lodge 3, ("FOP"), 139 Sergeants and 39 Lieutenants ("Sergeants" and "Lieutenants") of the Baltimore City Police Department ("Department") against the Department and the Police Commissioner seeking compliance with the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. § 207(a)(1) ("FLSA"). Plaintiffs seek declaratory relief, unpaid wages and overtime pay, liquidated damages, attorney's fees and costs.

Plaintiffs contend that they are due overtime compensation for all hours worked in excess of 171 in a 28-day period because they do not fall within the exemptions from overtime for executive, administrative or professional employees. Defendants disagree and are also challenging the application of 29 C.F.R. Part 541 (hereinafter "Part 541") and the FLSA to the parties on constitutional and statutory grounds.

The parties agreed to bifurcate the issues of liability and damages, addressing liability first. Defendants argue that liquidated damages are inappropriate and that the applicable statute of limitations is two years, while plaintiffs contend that by agreement these issues were to be addressed later since they relate to damages.

Defendant moved to dismiss plaintiff FOP on the grounds that FOP was an improper plaintiff under 29 U.S.C. § 216(b). Under the statute, a cause of action may be maintained by plaintiff employees for themselves and other similarly situated employees. However, the statute bars unions from bringing representative actions under the FLSA. *Arrington v. National Broadcasting Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982). At oral argument, plaintiffs conceded that FOP's status as a party had no practical significance as it was not seeking judgment in its favor. Accordingly, the Court will dismiss plaintiff FOP.

I

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) requires that employees be paid time and a half for work over 40 hours per week. Section 213(a)(1) exempts from that requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The employer has the burden of proving that an employee is exempt from the overtime requirement. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). The Act's "terms of coverage . . . are to be liberally construed," *Thomas v. County of Fairfax, Virginia*, 758 F. Supp. 353, 358 (E.D. Va. 1991). This burden must be satisfied by clear and affirmative evidence. *Clark v. J. M. Benson, Co., Inc.*, 789 F.2d 282, 286 (4th Cir. 1986); *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984).

Plaintiffs have moved for partial summary judgment in their favor on the grounds that they are not salaried and do not qualify for the executive, administrative or professional exemptions to the FLSA's overtime requirements. However, defendants assert that the primary duty of plaintiffs is management and, in any event, that material issues of fact exist which preclude the entry of summary judgment on the exemption issue. Accordingly, it is necessary to review the regulations pertaining to all of these exemptions. In order to qualify under any of the exemptions, an employee must be paid "on a salary basis"; therefore, this is the first step in our analysis. 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e).

Salary Basis

Under the regulations, an employee is salaried if he is regularly paid a predetermined amount that is "not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). However, the regulations then provide three exceptions to the rule that employees must be paid their full weekly salary to qualify for an exemption from overtime: 1) deductions are permissible when the employee is absent for a day or more for personal reasons; 2) deductions are permissible, in accordance with a bona fide plan, when the employee is absent for a day or more for sickness or disability; and 3) penalties for infractions of "safety rules of major significance" are permissible. 29 C.F.R. §§ 541.118(a)(2)-(3), (a)(5). Prior to September 18, 1992, deductions for partial day absences were impermissible for salaried employees. *See* 57 Fed. Reg. 37,666 (1992). However, public accountability concerns regarding paying public sector employees for time they did not work led the Department of Labor to issue a new regulation permitting deductions for partial day absences for public employees. 29 C.F.R. 541.5d.

Faced with the peculiarities of collective bargaining agreements and the difficulties involved in applying rules designed for the private sector to employees of public agencies, several courts have ruled that part or all of the salary basis test is invalid as applied to the public sector. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), *as amended on denial of rehearing*, 60 F.3d 1346 (1995), *cert. denied*, 116 S. Ct. 774 (1996) (because salary basis test essentially deprived public employers of the executive and administrative exemptions, it was invalid, in its entirety, as conflicting with Congress' intent that public agencies have the benefit of these exemptions); *Hilbert v. District of Columbia, a Mun. Corp.*, 23 F.3d 429, 435 (D.C. Cir. 1994) (Henderson, J. concurring in part, dissenting in part); *Stewart v. City and County of San Francisco*, 834 F. Supp. 1233 (N.D. Cal. 1993), *aff'd*, 69 F.3d 545 (9th Cir. 1995). The Department urges the Court to adopt this logic. In fact, the Department goes further and contends that Part 541 is invalid in its entirety as applied to defendants under the Administrative Procedure Act and is contrary to congressional intent, arbitrary and capricious.[1]

Previously, in two companion cases, *Quirk v. Baltimore County, Md.*, 895 F. Supp. 773 (D. Md. 1995) and *West v. Anne Arundel County, Md.*, Civil No. 90-2281, 1995, this Court examined the salary basis test and concluded that the rule prohibiting deductions for partial day absences was invalid as applied to the public sector because it was contrary to congressional intent. Pursuant to *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), once the Court determined that congressional intent was not clear, it examined "whether the agency's answer [was] based on a permissible construction of the statute." *Id.* at 843. This examination revealed that the Department of Labor itself had concluded that the partial day docking rule was inconsistent with congressional intent.[2]

---

[1] *See infra.*

[2] The Department of Labor stated:

> With regard to the public sector . . . it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial day absences. State and local governments were thus

However, this Court upheld the remainder of the salary basis test stating that "[w]hile the salary basis test is clearly far from ideal and rather impracticable when applied to the public sector, there is no indication that it is not *a* permissible construction of the statute." 895 F. Supp. at 780. The Court noted further that the conclusion in *Service Employees* was flawed and instead adopted the rationale set forth in *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995). *Mueller* held that after the promulgation of 29 C.F.R. § 541.5d, effective September 18, 1992, the regulation's requirements are valid. Therefore, any invalidity is limited to the "docking rule" for partial day absences due to personal reasons, illness or accident. Seeing no reason to break with this earlier conclusion, the Court finds that the docking rule regarding absences of less than one day for personal reasons or because of illness or accident is the only aspect of the salary basis test that is invalid.

> being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

57 Fed. Reg. 37,670 (1992). The Department of Labor also stated:

> It had become apparent to the Department . . . that the previously existing rules and enforcement policy were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments.

57 Fed. Reg. 37,671 (1992).

Applying the balance of the salary basis test to the instant facts demonstrates that plaintiffs' basis of payment contains both salary and hourly characteristics. Plaintiffs contend that because they receive overtime under certain circumstances, receive shift differentials on an hourly basis, and are subject to reduction for absences of less than one day and to suspension without pay, they are not salaried employees. Defendants, however, point out that salary add-ons, including both overtime and shift differentials, are permissible under the regulations, and that there have been no deductions from a plaintiff's pay for partial day absences, or for suspension without pay.

Article 12 of the 1991-93 collective bargaining agreement or Memorandum of Understanding ("MOU") specifies that sergeants and lieutenants "shall receive the salary rates reflected in [the appropriate] salary schedule." Sergeants and lieutenants are paid bi-weekly based on a fixed annual salary determined by collective bargaining. The amount actually paid may vary due to negotiated "add-ons," such as periodic benefits, overtime or secondary employment pay.

Pursuant to the collective bargaining agreement, sergeants and lieutenants receive overtime at a rate of time and a half under the following circumstances:

(1) Witness at Departmental Trial Boards.

(2) Use of force by a subordinate when circumstances require the supervisor to be present.

(3) Serious injury to a subordinate when the supervisor's presence is required.

(4) Resolving a citizen's complaint lodged with a supervisor against a subordinate.

(5) Staying over at court after the shift ends.

(MOU 1991-1993, Article 11). Also, the police commissioner has discretion to order that exempt personnel be paid overtime during emergency operations. A sergeant or lieutenant is entitled to overtime for all hours worked on a cancelled off-day. Finally, sergeants and lieutenants are entitled to overtime when they work under a federal grant program. However, such overtime pay is dictated by federal officials, not the Department.

Plaintiffs also receive an hourly shift differential for work at night. The collective bargaining agreement also provides for four hours extra compensation for working certain holidays and if personal leave is cancelled under certain circumstances. However, overtime alone will not render plaintiffs hourly employees. The regulations provide that additional compensation for example, bonuses or commissions, does not alter the salary basis of payment. 29 C.F.R. § 541.118(b). The Fourth Circuit has interpreted this to mean that overtime does not render an otherwise salaried employee hourly. *Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd.*, 903 F.2d 290 (4th Cir. 1990); *Masters v. City of Huntington*, 800 F. Supp. 363, 368 (S.D.W. Va. 1992); *International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990).

The pay scheme here is similar to that in *Quirk* and *Masters v. City of Huntington* where plaintiffs were found to be salaried. In addition to their minimum predetermined salary which was paid bi-weekly, the plaintiffs in *Quirk* received overtime, out-of-class pay and shift differentials based on an hourly rate of pay. 895 F. Supp. at 781. Similarly, in *Masters,* the pay schedules of deputy chiefs and captains set forth hourly rates of pay but, to arrive at the amount owed bi-weekly, the City divided their annual salaries by twenty-six, the number of pay periods in a year. 800 F. Supp. at 367. They were paid the same base salary whether they worked 96 or 144 hours. *Id.* They were, however, paid for work beyond their regularly scheduled shifts on an hourly basis. *Id.* Nevertheless, following Fourth Circuit precedent, both Courts ruled that additional pay at an hourly rate does not defeat the exemption, because it is expressly permitted by the rules.[3] *Quirk,* 895 F. Supp. at 781; *Masters,* 800 F. Supp. at 368.

Based on these facts alone, the Court would conclude that plaintiffs are paid on a salary basis. The pay they receive every two weeks is based on a fixed annual salary which has been divided into 26 bi-weekly, equal pay amounts. This amount may vary due to negotiated increases, such as periodic benefits, overtime, secondary employment pay, and standard deductions. Only pay that is in addition to the basic two week salary rate is computed at an hourly rate. All shift differentials work to plaintiffs' benefit; none reduce their salaries based on the quantity of work performed.

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[3] § 541,118(b) provides in pertinent part:

> It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment.

However, other factors affect whether plaintiffs are salaried. An employee is not salaried if he is subject to salary deductions "because of variations in the quality or quantity of the work performed" beyond the three listed exceptions. 29 C.F.R. § 541.118(a).

As evidence that they are not salaried, plaintiffs submit that they are subject to a reduction in pay for absences of less than one day. However, defendants maintain that there have been no deductions from a sergeant's or lieutenant's pay for partial day absences. Plaintiffs contend that an actual reduction in pay is not necessary. Rather, the mere possibility of deduction is sufficient to demonstrate that plaintiffs are non-salaried. *Kinney v. District of Columbia,* 994 F.2d 6, 11 (D.C. Cir. 1993); *Hurley v. Oregon,* 27 F.3d 392 (9th Cir. 1994). In order to comply with the FLSA, on May 6, 1993, the Commissioner amended General Order 1-88 ending pay deductions for partial day absences. Thus, only the period prior to May 6, 1993, is at issue.

Plaintiffs also claim that Department policy permitting suspension without pay for violations other than infractions of safety rules of major significance constitutes an impermissible deduction of salary.[4] The Commissioner has general authority to suspend members of the

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[4] Unlike reductions for partial day absences, the 1992 amendment to the regulations did not alter the prohibition on deductions for minor infractions for public employees. 57 Fed.

Department from duty, with or without pay. Baltimore City Local Laws, Police Department, Section 16-11. Suspensions under this authority are not limited to violations involving major safety infractions.

Authority to suspend is clarified in Article 17 of the MOU, which provides for emergency suspension with or without pay "when it appears that the action is in the best interest of the public and the law enforcement agency." Article 17 directs immediate suspension when any member is "arrested and charged with a criminal offense, a serious traffic violation involving death or serious personal injury." *Id.* Under General Order 7-91, suspension without pay "shall" be imposed only if a member is charged with a felony.[5] *Id.* No period of time for suspension without pay is specified.

Members are also subject to suspension without pay for violations of the Medical Leave Abuse Control Program. The penalties include one day suspension for the first violation and three days suspension for the second violation. Defendants contend that since 1989 no sergeant or lieutenant has been suspended without pay for less than one week.

Reg. 37674 (1992) (Department of Labor found no sufficient basis for distinguishing between the public and private sectors in regard to deductions for disciplinary suspensions).

[5] Suspensions with pay "shall" be imposed on members for violating criminal laws, driving while intoxicated or for traffic violations involving fatalities, serious personal injuries or eluding an officer. Suspension without pay "may" be imposed for insubordination and for drug or alcohol use while on duty. However, no time periods are specified.

The Fourth Circuit has ruled that "disciplinary reductions in pay, other than for violations of major safety rules, constitute reductions in pay based on the quantity and quality of the employee's work." *Shockley v. City of Newport News,* 997 F.2d 18, 24-25 (4th Cir. 1993). Safety rules of major significance include "only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." 29 C.F.R. § 541.118(a)(5).

Recognizing that it is not clear whether any plaintiff in *Shockley* actually was docked for the non-major rule infraction at issue, namely failure to report absences from work, this Court has previously held that the mere possibility of an improper deduction in pay does not defeat an employee's salaried status. *Quirk,* 895 F. Supp. at 783; *West, et al. v. Anne Arundel County, Md.,* Civil No. 90-2281, 1995. In so holding, we rejected the approach of several courts who relied on the fact that the regulations specifically require that an employee be "subject to a deduction" and not that an employee's pay actually be docked. § 541.118(a); *See, e.g., Kinney v. District of Columbia,* 994 F.2d 6, 11 (D.C. Cir. 1993); *Abshire v. County of Kern,* 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991) (deductions for absences of less than a day was "completely antithetical to the concept of salaried employee"); *D'Camera v. District of Columbia,* 693 F. Supp. 1208, 1212 (D.D.C. 1988); *Banks v. City of North Little Rock,* 708 F. Supp. 1023, 1025 (E.D. Ark. 1988); *Hawks v. City of Newport News, Va.,* 707 F. Supp. 212, 215 (E.D. Va. 1988); *Persons v. City of Gresham, Or.,* 704 F. Supp. 191, 194 (D. Or. 1988); *Lacey v. Indiana State Police Dep't,* 810 F. Supp.

244 (S.D. Ind. 1992) (holding that being potentially subject to reduction for infractions of less than major safety significance renders employees hourly).

Instead, we adopted the line of cases that relied, in part, on a 1986 Department of Labor letter ruling which states:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

Quirk at 783. *See Auer v. Robbins,* 65 F.3d 702, 710 (8th Cir. 1995), *cert. granted,* 116 S. Ct. 2545 (1996);[6] *McDonnell v. City of Omaha, Neb.,* 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied,* 510 U.S. 1163 (1994); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta,* 920 F.2d 800, 805 (11th Cir. 1991). Thus, if plaintiffs can show no evidence of an employee being impermissibly docked, the employer has met its burden of proving that employees' pay was not "subject to deduction."

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[6] The Supreme Court has granted certiori [sic] to address (1) whether the salary basis test applies to public-sector employees; (2) whether an employer's rarely invoked policy that provides for the possibility of disciplinary suspensions without pay for violations of certain work rules renders the employees unsalaried when the employer imposes a one-time disciplinary suspension without pay; (3) whether the "window of correction" regulation (29 C.F.R. § 541.118(a)(6)), preserves the salaried status of its employees. 64 U.S.L.W. 38 (U.S. June 25, 1996).

Here, it is stipulated by the parties that since 1989 no plaintiff has received a pay deduction for a partial day absence. As to plaintiffs' suspension claim, evidence has been presented that no sergeant or lieutenant has been suspended without pay for less than one week since 1989.[7] Thus, because the record is devoid of any evidence to prove any plaintiff ever suffered an impermissible reduction in pay, defendants have demonstrated that plaintiffs' pay is not subject to reduction because of the quality or quantity of the work performed. 29 C.F.R. § 541.118(a).

As to the deductions for partial day absences, even if such deductions were made, it would not result in loss of the exemption because the Department properly corrected its policy through the "window of correction" permitted under 29 C.F.R. § 541.118(a)(6). The "window of correction" provides:

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[7] According to the affidavit of Herbert R. Weiner, counsel for FOP, at some unspecified time, Sergeant James Kulbicki was suspended without pay for an unspecified period of time when he was charged with the commission of a felony. This is insufficient to contradict defendants' assertion that no suspension has occurred. In any event, the Court is of the opinion that the arrest of a law enforcement officer on criminal felony charges constitutes a safety infraction of major significance. While being charged with committing a felony does not fit precisely within the definition of safety rules of major significance set forth in the regulations, the unique circumstances of law enforcement and its relationship with the public and the public's safety render the commission of crimes by individuals sworn to enforce the laws, safety infractions of major significance. § 541.118(a)(5); *See Childers v. City of Eugene*, 922 F. Supp. 403, 406-07 (D. Or. 1996).

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts of the particular case. . . . where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

By its own terms, this section applies only when deductions *are* made, which is not the case here. Because no employee was affected by the prior policy, there was no reason for the Department to reimburse any employee for such a deduction, but clarification issued by the Commissioner on May 6, 1993, clearly constituted a promise to comply in the future.[8]

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[8] The amended general order issued by the Commissioner stated that

> an FLSA Exempt member who is absent less than one-day for personal reasons and who has exhausted all paid leave . . . , shall be marked as working an entire day.
>
> If [any FLSA Exempt members] are aware of an improper deduction from [their] pay since April 24, 1989, advise the Attendance Clerk . . . in order that you may be reimbursed.

All FLSA Exempt members, including sergeants and lieutenants were sent copies of this amendment. No sergeant or lieutenant has requested reimbursement.

The Department should not be denied the opportunity to utilize the "window of correction" under 29 C.F.R. § 541.118(a)(6) on the technicality that no deduction was ever made in this case. Under the circumstances the window of correction could have been properly utilized. *Quirk,* 895 F. Supp. at 783; *Hartman,* 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd,* 903 F.2d 290 (4th Cir. 1990).

Therefore, because Department policy regarding deductions for partial day absences and deductions for infractions of rules other than rules of major safety significance is permissible under the regulations, the Court finds that plaintiffs are not subject to reduction based on the quality and quantity of work performed and are therefore paid on a salary basis.

Having determined that plaintiffs are salaried, the Court will now consider whether plaintiffs qualify as executives, administrators or professionals as defined in 29 C.F.R. §§ 541.101 through 541.315. The regulations provide both "long" and "short" tests to determine whether an employee meets the requirements of the applicable exemption. *See* 29 C.F.R. §§ 541.1, 541.2, 541.3. The long test for the exemptions applies to lower-paid employees, while the short test applies to employees making at least $250 per week. *Id.* Because it is agreed that all plaintiffs make at least $250 per week, the short test applies for all three exemptions.

Executive Exemption

Under the short test for an executive employee, an employee is exempt if the employer demonstrates that the employee's "primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees." 29 C.F.R. § 541.1(f).

The Fourth Circuit has recently addressed the regulations interpreting the primary duty test:

> Analysis of whether an employee's primary duty is management begins with determining which of the employee's duties involve management of a recognized department or subdivision of the employer. As a 'rule of thumb,' the employee must devote more than fifty percent of his time to these duties. 29 C.F.R. § 541.103 (1992). Other pertinent factors, however, may indicate that management is the employee's primary duty. Among the factors to be considered are: (1) the relative importance of the managerial duties as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

Shockley, 997 F.2d at 25-26.

In support of their contention that plaintiffs qualify as executive employees, defendants have submitted deposition testimony and/or declarations of both the present Commissioner, Thomas C. Frazier, and former Commissioner Edward V. Woods,[9] four captains and nine majors, several senior police officials, as well as general orders, standard operating procedures, Department rules and regulations, and civil service classifications.

In their motion, defendants argue that exemption should be based solely on the responsibilities of the rank and not on the specific sergeant and lieutenant positions held by the individual plaintiffs. However, in response to plaintiffs' motion, defendants submitted declarations addressing the daily duties and responsibilities of several of these specific positions. According to defendants, the actual number of different positions held by all plaintiffs is 54.[10]

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[9] Woods served as commissioner from 1989 to 1993.

[10] Lieutenant Elmer Dennis, Jr., the custodian of personnel records for the Department, prepared the following list of jobs held by plaintiffs after reviewing their personnel files and their answers to defendants' interrogatory.

Patrol

Shift Commander; Operations Flex Squad Commander; Neighborhood Operations Commander; Administrative Lieutenant; Neighborhood Lieutenant; Sector Supervisor; Squad Supervisor; Sergeant/Special Operations; Operations Flex Squad Supervisor; Neighborhood Services Supervisor; Administrative Sergeant; Administrative Supervisor; Inspection/Administrative Sergeant; Statistical Coordinator; Statistical Unit Supervisor; Statistics Sergeant; Desk Coordinator; Community Relations Supervisor; Statistical Unit Supervisor; Booking Desk Sergeant; Desk Sergeant; DEU/Vice Sergeant; Bike Squad Supervisor.

In contrast, plaintiffs have submitted the deposition testimony of various sergeants, lieutenants, majors and captains which describes the daily activities of sergeants and lieutenants generally. The evidence presented by plaintiffs does not distinguish between the two ranks and does not specify the exact position held by the sergeants and lieutenants who were deposed.

Criminal Investigations Bureau

Unit Commander; Administrative Lieutenant; Support Services Commander; Squad Supervisor; Liaison with Medical Examiner.

Tactical Section

Platoon Commander; Helicopter Commander; K-9 Commander; Administrative Lieutenant; Administrative Manager; Squad Supervisor; Supervisor, K-9; Detail Sergeant; Administrative Sergeant.

Operations Bureau – Executive Assistant (Lieutenant).

Property Division

Construction and Repair Unit Supervisor; Armory Unit Supervisor; Motor Pool Unit Supervisor.

Legal Affairs – Supervisor (Unit Sergeant).

Management Information Systems Division – PC Coordinator.

Fiscal Division – Assistant Director.

Special Operations Division – Violent Crime Task Force Field Commander; Building Security Supervisor.

Communications Division – Shift Commander; Shift Supervisor.

Internal Investigation Division – Investigations Supervisor.

Education & Training Division – Field Operations Supervisor; Supervisor/Instructor; Support Section Supervisor; Instructor; Firearms Instructor Supervisor.

As further support for its position, defendants rely on answers provided by sergeants and lieutenants to questionnaires produced in preparation of promotional examinations to the ranks of sergeant and lieutenant. The reports analyzing the results of the surveys indicate that sergeants and lieutenants consider management and supervision to be their most important duty. However, plaintiffs object to reliance on these answers as skewed. Specifically, plaintiffs contend that the surveys cannot be relied upon to ascertain duties in the context of the FLSA because the studies sought to isolate management skills specific to the ranks of sergeant and lieutenant – duties which lower ranking members do not perform. Moreover, plaintiffs challenge the usefulness of the answers on the grounds that the authors of the reports analyzing the results are not experts on the FLSA.

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment can only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, summary judgment is not appropriate unless, viewing the possible inferences in a light most favorable to the non-moving party, no reasonable trier of fact could return a verdict in its favor. *Helm v. Western Maryland Ry. Co.*, 838

F.2d 729, 734 (4th Cir. 1988); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Moreover, on a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see Miller v. Leathers*, 885 F.2d 151, 154 (4th Cir. 1989), *cert. denied*, 498 U.S. 1109 (1991).

It should also be noted that in the Fourth Circuit the standard for summary judgment is strict, and that summary judgment is inappropriate even if merely the inferences to be drawn from the facts are in dispute. " 'Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them.' " *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967) (quoting *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965)); *see also Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

A thorough review of all the evidence submitted establishes that factual disputes pervade the issue of whether the primary duty of plaintiffs is management. Whether an employee's primary duty is management depends on "all of the facts in a particular case." 29 C.F.R. § 541.103. The regulations describe managerial functions as:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their

> productivity and efficiency for purposes of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

29 C.F.R. § 541.102(b). Further, an exempt executive employee must "customarily and regularly exercise discretionary powers," meaning he "normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties." 29 C.F.R. § 541.107.

Here, the parties dispute whether the primary duty of plaintiffs is management and whether plaintiffs regularly exercise discretion. In particular, there is conflicting evidence regarding the percentage of time sergeants and lieutenants spend performing managerial duties relative to performing nonmanagerial duties. Among the senior officials who were deposed, there was no consensus as to how sergeants and lieutenants spend the majority of their time. The declarations submitted by senior officials uniformly state that the management and supervisory functions of each job discussed consume more than 50 percent of the officer's time. In contrast, almost every sergeant and lieutenant testified that they do not spend more than half of their time on management duties. The Daily Activity Reports filled out by plaintiffs further muddle the issue. While several of the sample reports reflect that sergeants spend a substantial amount of time doing many of the same duties as officers, including patrolling, conducting surveillance, making arrests, and executing warrants, these reports also indicate that 8-9 hours a day is spent on "Supervisory Duties."

Moreover, according to the deposition testimony, the role of sergeants and lieutenants in setting work schedules and assignments, and the degree of oversight afforded such decisions, depends on the particular unit or position. With regard to discipline, the parties agree that sergeants and lieutenants can impose verbal reprimands only. However, there is no agreement as to whether sergeants and lieutenants make disciplinary recommendations and how much weight these recommendations are given. Similarly, the parties agree that sergeants and lieutenants are informally involved with subordinates' grievances. However, once a grievance is formalized through the writing process, sergeants and lieutenants merely pass it up the chain of command.

The same variations in testimony exist regarding the role of sergeants and lieutenants in hiring and promotion decisions. Likewise, the facts are in dispute as to whether sergeants and lieutenants train subordinates. While the majority of sergeants and lieutenants testified that they do not train subordinates, some plaintiffs acknowledged that they develop training programs or train based on personal experience.

According to the declarations, sergeants and lieutenants are "relatively free from supervision," or perform their duties with "minimal" or "very limited" supervision. In contrast, according to deposition testimony, sergeants and lieutenants must report to their supervisors prior to and after performing any significant law enforcement activity.

Further, the declarations speak of the job duties of the specific sergeants and lieutenants in terms of "participates in" or "has input into" tasks such as interviewing, selecting, training, disciplining, resolving grievances, and developing policy. However, the declarations do not quantify the level of participation and the importance placed on the input of these sergeants and lieutenants. While the declarations state that the positions being discussed require the exercise of discretion and independent judgment, it is not clear whether this discretion involves routine work or whether it is "customarily and regularly" exercised. 29 C.F.R. § 541.107. At the same time, plaintiffs contend that the tasks they perform, including preparing evaluations of their subordinates, reviewing reports prepared by subordinates to ensure compliance with Department standards, and maintaining attendance records of subordinates, are routine, repetitive and nondiscretionary. Thus, based on the variations presented in the depositions, declarations, surveys and job descriptions, it is clear that the degree to which plaintiffs are free from supervision, the weight given to their recommendations, and the importance of their managerial functions relative to their other duties are disputed issues of fact.

Further, it is disputed whether certain functions performed by sergeants and lieutenants, including maintaining the Daily Activity Reports and attendance records, constitute "work directly or closely related" to the performance of management duties, or merely routine work which "does not aid in the supervision of employees or the management of the department." 29 C.F.R. § 541.108(b).

As to the relationship between the salary sergeants and lieutenants receive and the wages earned by their subordinates, plaintiffs maintain that, as a result of overtime, it is not unusual for subordinates to earn more money than their supervisors. However, the Department submits that the annual base salaries of sergeants and lieutenants, determined by collective bargaining, are significantly higher than the base salary officers receive.[11] Nevertheless, in light of the numerous factual disputes present in this case, the fact that sergeants and lieutenants receive a higher base salary as compared to officers is not dispositive of the executive exemption issue.

Thus, in spite of the voluminous record, the Court is unable to determine as a matter of law whether the primary duty of sergeants and lieutenants is management. While determining whether a particular duty constitutes a management function under the regulations is a legal question, the amount of time devoted to a managerial duty and its significance are factual issues. *See McGrath v. City of Philadelphia,* 864 F. Supp. 466, 489 (E.D. Pa. 1989); *Ahern v. State of New York,* 807 F. Supp. 919, 923-24 (N.D.N.Y. 1992), *aff'd, Reich v. State of New York,* 3 F.3d 581 (2d Cir. 1993), *cert. denied,* 510 U.S. 1163 (1994).

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[11] For instance, in 1994, the base annual salary of officers was $24,224, while the base annual salary of sergeants and lieutenants was $36,094 and $41,030, respectively.

In order to determine whether the primary duty of sergeants and lieutenants is management, the specific duties of each position must be examined. Instead of providing the Court with this information, plaintiffs collectively addressed sergeants and lieutenants even though it is evident that each position within each unit or division carries with it responsibilities not necessarily related to the rank of sergeant or lieutenant. Because summary judgment cannot appropriately be granted on the basis of rank in this case, plaintiffs' motion is denied.

The Court notes that defendants have produced declarations that address the duties of specific positions held by plaintiffs, to which plaintiffs have not specifically responded. However, given the present posture of this case, wherein defendant has not moved for summary judgment on the basis of the specific positions, summary judgment in favor of defendant as to those positions is likewise inappropriate.

Similarly, plaintiffs' failure to specifically address each position precludes the determination of whether sergeants and lieutenants manage a recognized department or subdivision of the Department. 29 C.F.R. § 541.104(a).[12] Accordingly, genuine issues of material fact preclude summary judgment on the issue of whether sergeants and lieutenants are exempt executives.

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[12] According to a stipulations summary prepared by the parties, all but 15 plaintiffs have stipulated that they regularly supervise at least two full-time employees.

Administrative Exemption

Under the short test, an employer is an exempt administrator if his "primary duty consists of . . . [t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer . . . , and [w]ho customarily and regularly exercises discretion and independent judgment." 29 C.F.R. 541.2(e)(2). Therefore, under the short test, proof of an exempt administrative employee requires either that an employee "spends half his time on administrative duties" or that his "administrative duties have special significance relative to [his] other duties." *Shockley,* 997 F.2d at 28. Administrative duties include "advising the management, planning, negotiating, representing the company, purchasing, promoting sales and business research and control." 29 C.F.R. § 541.205(b).

The exercise of discretion and independent judgment "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." 29 C.F.R. Part 541.207(a). However, the exercise of discretion and independent judgment does not require a complete absence of review. Rather, it may consist of "recommendations for action" which may be revised or reversed upon review. 29 C.F.R. 541.207(e). Merely applying knowledge according to prescribed procedures, determining which procedure to follow, or determining whether specific standards are met is not exercising discretion and independent judgment under the FLSA regulations. 29 C.F.R. Part 541.207(c)(1).

Plaintiffs urge the Court to apply the "production/administrative dichotomy" whereby it has been held that preventing, investigating and detecting violations of the law constitute activities that do not qualify as administrative duties because such work is the "primary mission" of law enforcement, or production work. *Reich v. State of New York*, 3 F.3d 581, 587 (2d. Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994).

Plaintiffs claim that they have little involvement with the performance of office or nonmanual work directly related to management policies of the Department's operations. In support of this contention, plaintiffs have produced deposition testimony of several sergeants and lieutenants stating that they spend the majority of their time performing basic police work and only a small amount of time on administrative tasks. Further, plaintiffs submit that the administrative duties sergeants and lieutenants perform are merely routine duties consisting of applying basic techniques, procedures, repetitious experience and specific standards, which do not require the exercise of discretion and independent judgment.

On the other hand, in response to plaintiffs' motion, defendants have presented testimony of Department representatives demonstrating that sergeants and lieutenants are expected to change policies they disagree with first, and then inform their superiors, and that lieutenants develop standard operating procedures. Moreover, the declarations submitted by defendants state that the job duties of eight lieutenant positions and sixteen sergeant positions satisfy the administrative exemption requirements.[13] Specifically, Major Patrick L. Bradley, the former Director of the Education & Training Division, declared that the instructors in the Education & Training Division, consisting of both sergeants and lieutenants, exercise discretion and independent judgment in developing course outlines and lesson plans in accordance with the training objectives of the Maryland Police Training Commission – work that is "directly related to management policies or general Department operations." Further, a declaration prepared by a panel of officers[14] knowledgeable about Patrol Bureau positions stated that certain lieutenants and sergeants in the Patrol Bureau have duties that are directly related to management policy and require the exercise of discretion and independent judgment. As previously noted, plaintiffs did not specifically respond to the declarations.

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[13] The lieutenant positions include: Administrative Lieutenant, Neighborhood Lieutenant, Executive Assistant, Construction and Repair Unit Supervisor, Assistant Director, Field Operations Supervisor, Supervisor/Instructor, Administrative Assistant to Deputy Commissioner.

The sergeant positions include: Administrative Sergeant, Administrative Supervisor, Inspection/Administrative Sergeant, Statistical Coordinator, Statistics Sergeant, Desk Coordinator, Community Relations Supervisor, Statistic Unit Supervisor, Administrative Manager, Armory Unit Supervisor, Motor Pool Unit Supervisor, Unit Sergeant Supervisor, PC Coordinator, Supervisor/Instructor, Firearms Instructor Supervisor, Support Section Supervisor.

[14] The panel consisted of Marcellus Boles, Elbert F. Shirey, Jr., Victor D. Gregory, Douglas G. Coster, and Elmer Dennis, Jr.

Thus, the pertinent facts regarding whether plaintiffs perform the administrative duties outlined in the regulations, whether they have as their primary duty performing these administrative functions, and whether they exercise discretion are disputed, thereby precluding the entry of summary judgment in favor of any party.

Professional Exemption

The short test for a professional exempts an employee "whose primary duty consists of the performance either of work [requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study, as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes]." 29 C.F.R. § 541.3(e). Plaintiffs assert that they do not qualify for the professional exemption while, in response to plaintiffs' motion, defendants contend that six plaintiffs are exempt professional employees.

The regulations regarding professionals, 29 C.F.R. § 541.300, state "[t]he term 'professional' is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study." The regulations distinguish between learned professions and artistic professions. To be a learned profession requires "that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level." § 541.301(b). Furthermore,

> The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree. . . .

29 C.F.R. § 541.301(e)(1). The regulations also require that the work of a professional must involve the consistent exercise of discretion and judgment. 29 C.F.R. 541.3(b).

Teaching can qualify as a learned profession, provided the employee is " 'employed and engaged' . . . as a teacher in the school system, or educational establishment or institution by which he is employed." 29 C.F.R. § 541.301(g)(1). Under the regulations, the term "teacher" is broadly defined and may include teachers of music, trades, flying, automobile driving, as well as kindergarten or nursery school. 29 C.F.R. § 541.301(g)(2).

Defendants maintain that five plaintiffs[15] meet the professional exemption criteria because they have college degrees and were teachers at the Police Academy. 29 C.F.R. § 541.3(a). Plaintiffs counter that these five plaintiffs are not exempt because they are not "employed by an educational institution" whose "central purpose" is educating individuals. *Wilks v. District of Columbia*, 721 F. Supp. 1383 (D.D.C. 1989). Moreover, plaintiffs contend that while these Education & Training Division ("E&T") sergeants and lieutenants possess college degrees, there is no evidence to suggest that formalized education is required in order to instruct on procedures established by the Maryland Police Training Commission ("MTC") and the Department. The parties also dispute whether the duties of these E&T sergeants and lieutenants involve the exercise of discretion.

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[15] Joseph Darchicourt, Thomas A. Maly, Stanley F. Mezewski, James R. Sharpe, and William F. Stone.

In *Wilks,* the Court held that teachers in a correctional facility were qualified as exempt professionals because they were certified by the District of Columbia Public Schools, were fulltime educators, and taught formal classes in Basic Adult Education – including English, reading, mathematics, social sciences, art, home economics and physical education. 721 F. Supp. at 1386. While the *Wilks* Court recognized that the Lorton Correctional Facility was itself not a school, it held that the Office of Educational Services at Lorton, which employed the teachers, essentially was a school despite the fact that it granted no educational degrees. *Id.*

In contrast, the Court in *Hashop v. Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994), found ground instructors who trained space shuttle ground control personnel during simulated missions to be nonexempt. The Court found that the defendant space operations company was clearly not an educational establishment or institution, rather it was a for-profit aerospace corporation. 867 F. Supp. at 1295. Moreover, the Court determined that the instructors did not exercise the type of discretion and independent judgment required by the regulations. *Id.* at 1297-1299. While the plaintiffs in *Hashop* applied their advanced training and experience to make decisions, the decisions were made within a "well-defined framework" such that they did not have the "independent ability to effect the operation" of the simulations. *Id.* at 1298. The Court noted further that, when determining whether an employee is a "professional" for FLSA purposes, the focus is not on the employee's credentials, but rather on the qualifications required by the employer. *Id.* at 1296.

Like the plaintiffs in both *Wilks* and *Hashop,* the instructors at issue here are not employed by a traditional educational institution or school. The central purpose of the Baltimore City Police Department is law enforcement. The Education & Training Section of the Department provides basic police training, not a broad-based general educational curriculum like the one found in *Wilks.* However, the Department points out that the six month training course for new police recruits is accredited for approximately 20 college credits by Baltimore City Community College.

Because the regulations provide that instructors in aircraft flight and automobile driving may qualify as exempt teachers, the Court is persuaded that the teacher exemption applies not only to teachers in regular academic settings imparting a general educational curriculum, but also to teachers of occupations in a classroom setting not necessarily part of an institution whose central function is imparting a traditional basic education. The broad definition of teaching found in the regulations supports this conclusion. Teaching is defined broadly as "tutoring, instructing, lecturing, and the like in the activity of imparting knowledge" and includes teachers of "skilled and semi-skilled trades and occupations." 29 C.F.R. § 541.301(g)(2). Accordingly, just because the instant instructors do not teach in a traditional educational institution and do not teach basic education courses, does not necessarily mean they do not qualify as professionals.

However, in order to qualify as professionals under the FLSA, we must also determine whether the Department requires instructors to have acquired their advanced knowledge through a "prolonged course of specialized intellectual instruction." There is no evidence before the Court to suggest that prospective E&T instructors must have a college degree or any other type of formalized training. In fact, according to the deposition testimony of Major Bradley, former E&T Director, there is no particular rank requirement to be an instructor. Instructors consist of officers, agents, sergeants and lieutenants. It is illogical to exempt college-educated sergeant and lieutenant instructors, when other instructors are performing the same duties without a college education or the rank of sergeant or lieutenant. Accordingly, the Court cannot find as a matter of law that the course of study for E&T instructors constitutes knowledge of an advanced type necessary to qualify under the professional exemption.

Nevertheless, the Court will consider whether the instructors consistently exercise discretion and independent judgment in their work. 29 C.F.R. § 541.305(a). In *Hashop*, the Court held that discretion "must involve the authority to make basic decisions that affect the fundamental operation of the enterprise in question without seeking guidance from superiors as a matter of course." 867 F. Supp. at 1298.

Here, the instructors are assigned to teach specific curriculum topics. To that end, the instructors develop course outlines and lesson plans consistent with the training objectives set forth by the MTC. Plaintiffs contend that when they formulate lesson plans they are merely applying specific parameters of MTC objectives rather than exercising independent judgment as to what should be taught, and that the major has final say over any recommended presentation changes and all lesson plans are subject to supervisor's approval.

Major Bradley's declaration and deposition testimony corroborated that he reviews instructors' course material designs. Moreover, Bradley testified that he was responsible for the general content and accuracy of the plans and for ensuring that the plans were consistent with departmental policy. Bradley stated that

> The lesson plans are based on departmental procedure and departmental policy and 336 training objectives that come from the Maryland Police Training Commission for recruit training. Beyond those general guidelines the instructors are encouraged to develop their own lesson plans, deliver their own message, get it across in their own effective style, whatever it takes to communicate that information . . . .

Applying the *Hashop* definition of discretion to the instant facts, the Court cannot find that the work performed by the sergeant and lieutenant instructors involves the independent ability to effect how or what law enforcement methods are taught. Rather, the sergeant and lieutenant instructors' exercise of discretion is confined by departmental policy and MTC training objectives and involves only presentation methods regarding this information. The instructors are not authorized to present material inconsistent with departmental policies and MTC objectives. Moreover, lesson plans and tests are subject to review and revision by superior officers. Accordingly, Joseph Darchicourt, Thomas A. Maly, Stanley F. Mezewski, James R. Sharpe, and William F. Stone do not meet the professional exemption criteria of the FLSA. However, because it is disputed as to whether plaintiffs are exempt administrative employees, the Court is not in a position to find that these plaintiffs are entitled to overtime compensation.

In addition to the instructors, defendants maintain that Sergeant Richard L. Kline, the Personal Computer Coordinator, satisfies the professional exemption criteria. Plaintiffs disagree, claiming that Kline is merely a nonexempt computer operator.

Pursuant to the regulations, "computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals." 29 C.F.R. § 541.303(a). To qualify, an employee's primary duty must consist of at least one of the following:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (2) The design, development, documentation, analysis, creation, testing, or modification of

> computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
>
> (4) A combination of the aforementioned job duties, the performance of which requires the same level of skills.

29 C.F.R. § 541.303(b). While the exemption applies only to "highly skilled employees" proficient "in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming and software engineering," no specific academic degree, certification, or licensing is required. 29 C.F.R. § 541.303(c).

In support of their argument that Kline is exempt, defendants have submitted the declaration of Brenda Joyce Biggs, Director of the Management Information Systems Division ("MIS") of the Department. According to Biggs' declaration, Kline has a Bachelor of Science degree from John [sic] Hopkins University, has taken "several college level" computer systems courses, and has attended "a variety of computer systems seminars." Biggs declared that Kline took courses through Wave Technologies to become a certified Computer Network Engineer, but did not complete these courses.[16]

According to Biggs' declaration, Kline was responsible for developing and implementing Personal Computer

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[16] Kline retired in October, 1994.

Local Area Networks within the Department, advising Biggs of and resolving personal computer system problems, procuring hardware for users, and consulting with users regarding their hardware, software, and system functional specifications needs. Plaintiffs, however, shed no light on Kline's computer skills or his responsibilities. Instead, plaintiffs characterize Kline as "essentially a computer operator" and point out that there is no evidence that he holds a degree in computer systems.

Viewing the possible inferences in a light most favorable to defendants, the non-moving party on this issue, a reasonable trier of fact could find Kline exempt. Plaintiffs have failed to produce evidence from which the Court could find that Kline's computer systems analysis, programming, or software skills and proficiency, as well as his primary duty, do not exempt him from the FLSA's overtime requirements. Accordingly, plaintiffs' partial motion for summary judgment as to Kline must be denied. The Court is not in a position to find whether Kline was an exempt administrative or professional employee.

Good Faith and Liquidated Damages

Even though the Court has not ruled that any of the plaintiffs are entitled to overtime compensation as a matter of law, nevertheless, it is appropriate to address the issue of liquidated damages. Defendants maintain that it has put forth sufficient evidence of good faith to escape the otherwise mandatory liquidated damages; however, plaintiffs have not responded to the merits of this argument. Instead, plaintiffs claim that the parties had agreed to bifurcate the issues of damages and liability. But the Department maintains that the bifurcation of damages referred only to the individualized proof of specific damages, while the issues relating to the applicable statute of limitations and the availability of liquidated damages were not deferred.

The Court is persuaded that the statute of limitations and the liquidated damages issues are properly before it. Despite plaintiffs' alleged understanding of the agreement, the discovery process lends support to defendant's position. Plaintiffs sought and were provided discovery on these very issues. Correspondence with the Court demonstrates that, with the exception of deposing defendants' experts, the parties had completed discovery and did not contemplate the need for additional discovery. Moreover, the rationale for bifurcation, namely efficient use of judicial resources, would be defeated if the issues common to all plaintiffs – statute of limitations and liquidated damages – were not resolved prior to addressing issues related to the actual compilation of overtime hours worked by individual plaintiffs.

Section 216(b) of FLSA provides that an employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The Portal-to-Portal Act, 29 U.S.C. § 260, provides a limited defense to § 216:

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had a reasonable grounds for believing that his act or

> omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in § 216 of this title.

The limited defense requires the employer to show both that it acted in good faith and that it had reasonable grounds to believe it was not violating the FLSA. *See Richard v. Marriott Corp.*, 549 F.2d 303, 305-06 (4th Cir.), *cert. denied,* 433 U.S. 915 (1977); *Dybach v. State of Florida Dep't of Corrections,* 942 F.2d 1562, 1567 (11th Cir. 1991) (holding that employer failed to demonstrate reasonable grounds). "The good faith requirement mandates the employer have 'an honest intention to ascertain and follow the dictates of Act.' " *Renfro v. City of Emporia, Kan.,* 948 F.2d 1529, 1540 (10th Cir. 1991), *cert. dismissed,* 503 U.S. 915 (1992) (quoting *Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir. 1982). Good faith requires some investigation of potential liability. *Horan v. King County, Wash., Division of Emergency Medical Services,* 740 F. Supp. 1471, 1481 (W.D. Wash. 1990). An employer cannot "simply remain blissfully ignorant of FLSA requirements." *Burnley v. Short,* 730 F.2d 136, 140 (4th Cir. 1984).

Defendants have met their burden of showing good faith and a reasonable grounds for believing they were not violating the Fair Labor Standards Act. After the Supreme Court issued its decision in *Garcia,* the City of Baltimore appointed the City's Labor Commissioner, Jeffrey A. Austin, Chairman of the Fair Labor Standards Act Implementation Committee. The Committee was charged with determining the requirements of the FLSA and ensuring the City's compliance with the Act and its regulations.

In order to accomplish its task, the Committee collected data regarding city job classifications, the FLSA's impact on those classifications, and how to best implement the Act. Committee members attended FLSA seminars with speakers from DOL's Wage and Hour Division and legal experts on the FLSA. The Committee, along with the City's departments and agencies, examined city personnel to determine which employees were likely to be affected by the ruling. The procedures developed by the Committee regarding FLSA implementation were carried out with the participation and approval of the Baltimore Law Department.

Specifically as to the Baltimore City Police Department, the Committee dealt directly with the Department and determined that police officers were not exempt, but that police sergeants and higher ranks were exempt. Accordingly, this evidence establishes that if in fact the Department has violated the FLSA, it acted in good faith to determine the FLSA's requirements and had an objectively reasonable basis for believing that it was complying with the Act. Thus, in the event plaintiffs are found to be entitled to overtime compensation, they will not be awarded liquidated damages.

Statute of Limitations

In order to determine the appropriate statute of limitations, the Court must address the issue of whether defendants' violation of the FLSA was willful. If the

Department willfully violated the FLSA, a three-year statute of limitations applies; if it was not willful, a two-year statute of limitations applies. 29 U.S.C. § 255(a). In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the Supreme Court held that "willful" means "deliberate" and "intentional." Willfulness requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at 133. Negligent conduct is not willful. *Id.* In addition, good faith is a defense to willfulness, *Burgess v. Catawba County*, 805 F. Supp. 341 (W.D.N.C. 1992), "as good faith is necessarily inconsistent with knowing or reckless disregard." *Id.* at 351. *See also Dole v. Haulaway Inc.*, 723 F. Supp. 274, 288 (D.N.J. 1989), *aff'd*, 914 F.2d 242 (3d Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). For the reasons stated in the discussion of liquidated damages, the Court finds that the Baltimore City Police Department was not willful, so the proper statute of limitations is two years.

II

Validity of the DOL's Part 541 Regulations

As the Court has been unable to find plaintiffs exempt as a matter of law, the Court must address defendants' challenges to the validity of Part 541 of the FLSA's implementing regulations. First, defendants assert that Part 541 is invalid under the Administrative Procedure Act because States and their subdivisions had no notice nor opportunity to comment prior to its promulgation. Second, defendants claim that Part 541 is contrary to congressional intent and arbitrary and capricious as applied to defendants.

Pursuant to the Administrative Procedure Act ("APA"), an agency promulgating rules must issue notice of the proposed rule, provide the public a reasonable opportunity to comment on the proposed rule, and explain the rule which it eventually adopts. 5 U.S.C. § 553. *See Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1102 (4th Cir. 1985). Affording notice and comment to interested parties promotes public participation and informed agency decision-making. *Id.* at 1103.

The notice and comment requirements do not apply to "interpretive rules," 5 U.S.C. § 553(b) (3) (A), or when the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b) (3) (B). Failure to comply with the notice and comment rules regarding the issuance of a substantive rule, or failure to demonstrate "good cause" for dispensing with the procedures, renders the rule invalid and unenforceable. *Chrysler Corporation v. Brown,* 441 U.S. 281, 313 (1979); *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Comm'n,* 874 F.2d 205, 208 (4th Cir. 1989).

Interpretive rules "merely clarify or explain existing law or regulations" and essentially express the administrative agency's understanding of the underlying statute. *Linoz v. Heckler,* 800 F.2d 871, 877 (9th Cir. 1986) (quoting *Powderly v. Schweiker,* 704 F.2d 1092, 1098 (9th Cir. 1983), *General Motors Corp. v. Ruckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1074 (1985). On the other hand, legislative or substantive rules create new law or impose new rights or duties. *Jerri's Ceramics,* 874 F.2d at 207. Part 541 clearly is substantive, rather than interpretive. It creates an exception to the

FLSA's overtime requirements for employees who meet the stated criteria. An explanation of the FLSA's implementing instructions is an appropriate starting point for discussion. Prior to Congress' 1974 amendments, the FLSA did not apply to federal civilian employees or to State and local government employees. With the extension of the Act's coverage to State and local governments in 1974, notice and comment regarding the proposed rulemaking was provided. 39 Fed. Reg. 17,596-17,597. However, the 1974 amendments were stayed before their effective date, *National League of Cities v. Brennan*, 419 U.S. 1321 (1974), and eventually held invalid as to "traditional governmental functions" in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In 1985, the Supreme Court issued *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which overruled *National League of Cities*. Thereafter, the DOL promulgated an advanced notice of proposed rulemaking for 29 C.F.R. § 541 and request for comments. 50 Fed. Reg. 47,696 (1985). The DOL took no further action on Part 541 until 1991 when it issued an Interim Final Rule altering part of the salary basis test for public employees. 56 Fed. Reg. 45,824 (1991). At the same time, the DOL issued a notice of proposed rulemaking to modify the salary basis test in order to make public employers eligible for exemption. 56 Fed. Reg. at 45,828. The Department withdrew the interim rule when it issued the 1992 final rule adding section 541.5d to Part 541, which permits State and local governments to make deductions from an exempt employee's salary for absences of less than a day. 57 Fed. Reg. at 37,677. *See infra.*

Also, in the aftermath of *Garcia*, the DOL published a notice of proposed rulemaking for regulations covering State and local government employees. 51 Fed. Reg. 13,402 (1986). The final regulations for State and local governments, 29 C.F.R. § 553, were issued in 1987. Part 553 incorporates by reference the executive, administrative and professional exemptions set forth in Part 541 in two sections, and it makes public employees subject to these exemptions.[17] The DOL's final regulations were identical to the proposed regulations with respect to these sections. *See* 51 Fed. Reg. at 13,410 and 13,418 (1986).

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[17] Section 553.32 provides in pertinent part:

> Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

29 C.F.R. § 553.32(c). This language is repeated in § 553.216:

> [S]ection 13(a)(1) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, *as those terms are defined and delimited in 29 C.F.R. part 541*. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part 541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as 'executive' employees. Similarly, certain criminal investigative agents may qualify as 'administrative' employees under Section 13(a)(1).

29 C.F.R. § 553.216.

With this framework in mind, the Court must determine whether interested parties were afforded notice and a fair opportunity to comment and participate in the Part 541 rulemaking process. The Court notes that the facts before it present a unique situation. At the same time the DOL was issuing the Part 553 rules, it stated that it would address comments and issues involving Part 541 in a separate rulemaking process to be conducted in 1987. Nevertheless, the Court finds that Part 541's incorporation by reference in Part 553 provided interested parties with reasonable notice and reasonable opportunity to comment as required under the APA. The DOL's statements concerning the comments it received regarding Part 541, its responses to those comments, and the 1992 modification to the salary basis test, demonstrate that interested parties were provided adequate notice and an opportunity to be heard.

In the preamble to the Part 553 final rules, the DOL explained that the purpose of section 553.32 was "simply to highlight . . . other major FLSA exemptions which may have general application to State and local governments." 52 Fed. Reg. 2019. The DOL explained further that while it had received comments on the aspect of the salary basis test which prohibited deductions for absences of less than a day, it would address that issue during the rulemaking process for Part 541. *Id.*

The DOL's statements further reveal that the main focus of the comments was the application of the salary basis test to public employees. In particular, commenters urged that public employers should be permitted to deduct for employee absences of less than a day.[18] Also, in regard to Section 553.216, the DOL advised that "[s]everal commenters, including various cities, the NLOC and the NPELRA, stated that 29 C.F.R. Part 541 should be revised to eliminate the requirement that an exempt employee be paid on a salary basis." 52 Fed. Reg. 2023. However, in response the DOL repeated its position that, due to the separate rulemaking process for Part 541, it would not address the salary basis tests in Part 553. *Id.*

With respect to the executive, administrative and professional exemption criteria, apart from the salary basis test, comments were apparently limited to the use of job titles. In rejecting revision to this section, the DOL explained its historical position "that job titles in and of themselves are not factors to be relied upon in determining qualifications for this exemption." 52 Fed. Reg. at 2023. Rather, the DOL stated that "[d]eterminations in this regard must be made on a case-by-case basis" as

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[18] The DOL discussed these comments:

> Finally, several commenters requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 C.F.R. Part 541 that such employees be paid on a salary basis. The commenters argued that State and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as State and local government laws which preclude the payment of wages for hours not worked (except earned leave).

52 Fed. Reg. at 2019.

"any attempt to list job titles in this case would be misleading and inappropriate." *Id.* Thus, based on the fact that comments were received from various cities and organizations representing the interests of State and local governments, it is clear that "interested parties" received notice and had an opportunity to comment on the application of Part 541 to State and local government employees.

The narrow focus of the 1991 interim rule and the 1992 rule modifying application of one aspect of the salary basis test to public employees confirms that the difference between public sector and private pay systems was the main concern of interested parties with regard to Part 541. Accordingly, application of Part 541 to defendants complied with the notice and comment requirements of the APA.

In any event, the Court notes that while neither party has addressed this issue, the Court has serious doubts about the applicability of the APA's notice and comment requirement in these circumstances. When Congress amended the FLSA in 1974 to extend coverage to State and local government employees, it was not legislating in a vacuum. Rather, Congress determined that State and local government employees were entitled to the same wage and overtime laws and regulations applicable to private employees. In the aftermath of *Garcia* and the 1985 amendments to the FLSA, the DOL's application of the existing Part 541 regulations to State and local government employers did not constitute the promulgation of a new rule for purposes of the APA. Instead, Congress had determined that a new class of individuals were to be covered by the law and its existing regulations. The fact that State and local government employers were not interested parties when Part 541 was originally promulgated does not render application of these regulations to State and local government employers procedurally invalid. When in fact the DOL has promulgated new rules with regard to the FLSA, including Part 553, and Part 541(d), it has complied with the notice and comment requirements of the APA.

At the heart of defendants' procedural challenge is the fact that the DOL has not promulgated new Part 541 regulations addressed to public employees, but has instead applied regulations formulated for the private sector to public employees. This is essentially the argument defendants advance in their assertion that application of Part 541 to State and local employees is contrary to congressional intent, arbitrary, capricious, and unreasonable.

This assertion is based on the fact that originally the FLSA and its implementing regulations were not intended to cover public-sector employees. Nevertheless, public employers are now subject to the FLSA's requirements and, with the exception of the 1992 amendment, to regulations which have not been revised to address the unique characteristics of public-sector employment.

Defendants point to several actions on the part of the DOL as evidence that despite the DOL's awareness of the need to re-examine the application of the Part 541 regulations to State and local governments, the DOL has thus far failed to move forward. These actions include the DOL's issuance of a notice of proposed rulemaking concerning Part 541 following *Garcia,* 50 Fed. Reg. 47,696

(1985), its nonenforcement policy regarding the salary basis test announced in 1987, 57 Fed. Reg. 37,668 (1992), DOL comments issued in connection with the 1991 interim rule, 56 Fed. Reg. 45,828 (1991), and DOL comments issued in connection with the 1992 final rule, 57 Fed. Reg. 37,666 (1992).

Defendants assert that applying Part 541 to public employers is arbitrary and capricious because DOL has failed to consider Part 541's application to public employers in a detailed and reasoned fashion and has failed to provide a stated rationale for its decision. Defendants point to distinctions between the Part 551 regulations pertaining to federal employees, 5 C.F.R. § 551.101 *et seq.*, and Part 541 as evidence of the "irrationality of applying the old Part 541 private sector exemption regulations to State and local governments." Specifically, Part 551 utilizes job classifications to assist in making exempt status determinations and does not contain a salary basis test. According to defendants, conflicting court decisions regarding application of the salary basis test and presidential directives to the DOL to review Part 541 further attest to the arbitrariness and capriciousness of applying Part 541 to public-sector employees.

The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the test set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* the Court must first look to see if Congress has made its intent clear on a precise question. 467 U.S. 837, 842-43 (1984). If it is clear, the Court must "reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n.9. Where congressional intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 483. Courts give considerable deference to the expertise of an agency charged with executing a statute. *See, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389 (1984). Thus, as a threshold issue, the Court must determine if Congress specifically addressed whether Part 541 should apply to public employees.

When the FLSA was first extended to public-sector employees in 1974, Congress explained that the "bill extends minimum wage and overtime coverage to about 5 million non-supervisory employees in the public sector." H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2837. The Ninth Circuit has interpreted that statement to mean that Congress intended public agencies to have the benefit of the executive and administrative exemptions. *Service Employees Int'l Union, Local 102 v. County of San Diego*, 35 F.3d 483, 487 (9th Cir. 1994), *as amended on denial of rehearing*, 60 F.3d 1346 (1995), *cert. denied*, 116 S. Ct. 774 (1996). Based on the fact that following *Garcia*, Congress again amended the FLSA in order to accommodate "the particular needs and circumstances of the States and their political subdivisions," S. Rep. No. 159, 99th Cong., 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655, and again did not refer to the executive and administrative exemptions, the Ninth Circuit concluded that Congress "must have intended the executive and administrative exception to continue to apply to the public sector." 35 F.3d at 487; 60 F.3d at 1351.

The Court finds the Ninth Circuit's reasoning persuasive and is satisfied that Congress intended that public employers have the benefit of the exemptions. However, in these amendments, Congress did not address the issue of whether the primary duty tests and the salary basis test found in the regulations, which were promulgated prior to the FLSA's extension to public employees, apply to the public sector. Therefore, the Court must determine whether the DOL's "answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Earlier, with respect to application of the salary basis test to public employees, the Court found invalid only the rule for partial day absences ("docking rule") and upheld the remainder of the salary basis test. *See infra*. Defendants rely on numerous comments made by the DOL regarding the docking rule's inconsistency with congressional intent to support their contention that Part 541, in its entirety, is arbitrary, capricious, and inconsistent with congressional intent.

The Court disagrees. As with the remainder of the salary basis test, the Court is satisfied that the agency entrusted with interpreting the FLSA considered the statute and regulations and arrived at a reasoned determination that Part 541, with the exception of the docking rule for partial day absences, could be applied to the public sector without depriving public sector employers of the white collar exemptions. While applying the primary duty test to public sector plaintiffs in paramilitary organizations is not without its impracticalities, there is no evidence that it is an impermissible construction of the FLSA. The fact that the DOL has stated its intent on repeated occasions to conduct a separate rulemaking process for Part 541, without specifying whether all or just certain provisions of Part 541 would be addressed, does not alter the Court's conclusion. The majority of comments received regarding Part 541 pertained to the docking rule. The DOL studied this rule and found it to be inconsistent with congressional intent. Further, DOL's recognition that Part 541 is in need of updating and clarification does not render the instant regulations arbitrary and capricious. *See* 60 Fed. Reg. at 23,544; 59 Fed. Reg. at 20,610 and 57,129; 58 Fed. Reg. at 56,587. Accordingly, the Court finds that Part 541, with the exception of the docking rule for partial day absences, is not arbitrary and capricious.[19]

III

Constitutional Challenges

Finally, the Court will address defendants' constitutional challenges to the FLSA and its regulations. Defendants first contend that the extension of the FLSA to State and local governments without appropriate regulations constitutes a "failure in the national political process remediable under *Garcia.*" Alternatively, defendants assert that application of the FLSA to these defendants violates the commerce clause, as well as other constitutional limitations on Congress' power.

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[19] Because the Court has ruled that the regulations are valid, it need not address defendants' suggestion that the Court should defer to their classification of sergeants and lieutenants as exempt.

Failure of the National Political Process

Defendants' argument in regard to failure in the national political process is based on the Supreme Court's conclusion in *Garcia* that "the internal safeguards of the political process ha[d] performed as intended" in the factual setting addressed in that case. 469 U.S. at 556. From this statement and a later comment that "*Garcia* left open the possibility that some extraordinary defects in the national political process might render Congressional regulation of state activities invalid under the Tenth Amendment," *South Carolina v. Baker,* 485 U.S. 505, 512 (1988), defendants claim that failure of the national political process and the resulting undue burden on the States are factual determinations to be made by this Court.

To that end, defendants have submitted the testimony of two purported experts on the national political process, former Congressman John N. Erlenborn[20] and Professor A.E. Dick Howard.[21] Both experts opined that changes in the federal legislative political processes in the last thirty years have eroded the ability of State and local governments to accomplish their goals and protect their interests in the federal legislative process. In short, defendants' experts contend that the influence of State and local governments on members of Congress has been greatly reduced as a result of several factors, including the growing influence of interest groups and political action committees ("PACs") over both legislation and campaigning, the increasing complexity of legislation and the corresponding growth in congressional staff, the reduced influence of political parties as well as local parties and officials, and the rise in unfunded mandates. They conclude that this erosion results in a substantial failure of our national political process which unduly burdens State and local governments.

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[20] Congressman Erlenborn represented Illinois districts in the U.S. Congress from 1965 until January, 1985. He served on the House Education and Labor Committee, which had jurisdiction over the FLSA legislation. Defendants offer Congressman Erlenborn as an expert witness on the federal and State legislative processes, the national, State and local political processes, and the relationship of Congress to federal agencies from the late 1950's to the present.

[21] Professor Howard is a law professor at the University of Virginia Law School. Defendants offer him as an expert on federalism.

Defendants assert that application of the FLSA and its implementing regulations to State and local governments occurred because the political process failed; specifically, that the dominance of labor PACs blocked legislation seeking to exempt State and local governments from the FLSA's reach through large campaign contributions to incumbent Democrats on the Senate and House Labor Committees. Further, according to defendants, Congress' failure to spur the DOL to examine and reissue rules related to the public sector amounts to a failing in the national political process. Defendants submit that the liability and litigation costs incurred as a result of these failings have unduly burdened State and local governments.

Garcia did not outline what is meant by "failings in the national political process" or "laws that unduly burden the States." 469 U.S. at 554, 556. In *Baker*, the Court made note of this fact, yet again declining to define these terms. 485 U.S. at 512-13. Likewise, this Court is not in a position to attempt to define these terms.

In any event, the Court notes that defendants' argument here is more in the nature of debate on the meaning of federalism than the basis for evidentiary findings to be made by this Court. What defendants contend are failures in the national political process are more appropriately characterized as cyclical changes experienced by the interrelationship between the electorate and the federal, State, and local governments. The cyclical nature exhibited in the information relied upon by defendants is confirmed by the circumstances arising since the national election in 1994 when the control of the Democratic party over Congress was broken for the first time in 40 years. With the dominance of labor PACs over the House and Senate labor committees terminated, the Unfunded Mandates Reform Act of 1995 was promptly enacted, significantly minimizing unfunded mandates on State and local governments. Pub. L. No. 104-4, 109 Stat. 48 (1995). Plaintiffs accurately point out that the alleged failures raised by defendants, for the most part, existed when the Supreme Court decided *Garcia*. *See* Justice Powell's dissenting opinion at 564-567. Under the circumstances, the Supreme Court has already addressed the very issues related to any failure in the national political process in the application of the FLSA to state and local governments. Justice Powell, in his dissenting opinion in *Garcia,* pointed out the inconsistency should the judicial branch, even though "unelected," make the determination in regard to the failure of the national political process in light of the fact that judicial involvement was at the heart of the majority's objections upon which it relied to overrule *National League of Cities*. *Garcia* at 564 n.7. Accordingly, the Court finds that application of the FLSA to the public sector was not the result of failure of the political process as articulated in *Garcia*.

Commerce Clause

Defendants claim that applying the FLSA to the police forces of States and their political subdivisions violates the Commerce Clause, U.S. Const. art. I, § 8, cl.2, because they exist and operate entirely within one state and their activities have only a trivial effect on interstate commerce.

In *Garcia*, the Supreme Court rejected the "traditional" governmental function test set forth in *National League of Cities* as unworkable. *Garcia* at 546. Nevertheless, it recognized that States do "occupy a special and specific position in our constitutional system and the scope of Congress' authority under the Commerce Clause must reflect that position." 469 U.S. at 556. However, the Court held that the political process provided an adequate check on Congress' Commerce Clause authority, such that there was no need to identify limits to this power in "the factual setting of these cases." *Id.*

While the Supreme Court's recent opinion in *U.S. v. Lopez*, 115 S. Ct. 1624 (1995), signaled a retreat in how expansively the Court views Congress' Commerce Clause power, application of the FLSA to defendants is not unconstitutional. In *Lopez*, the Supreme Court held that Congress exceeded its power under the Commerce

Clause in enacting a statute criminalizing the possession of a gun in a school zone.[22]

After *Lopez,* when faced with a Commerce Clause challenge, a court must make a two step inquiry. First, it must determine whether the regulated activity affects commerce and whether Congress could have rationally concluded the same. 115 S. Ct. at 1630-31, 1658. Then it must determine whether the statute includes a "jurisdictional element which would ensure, through case-by case inquiry, that the [statute] in question affects interstate commerce." *Id.* at 1631; *U.S. v. Olin Corp.,* 927 F. Supp. 1502, 1532 (S.D. Ala. 1996); *U.S. v. Parker,* 911 F. Supp. 830, 834 (E.D. Pa. 1995). A statute is related to commerce or "any sort of economic enterprise" if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez,* 115 S. Ct. at 1631.

The FLSA was enacted in order to eliminate detrimental working conditions which burden commerce and adversely affect workers. 29 U.S.C. § 202(a); *United States v. Darby,* 312 U.S. 100 (1941). "[T]he purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Conway v. Takoma Park Volunteer Fire Dep't, Inc.,* 666 F. Supp. 786, 791 (D. Md. 1987), *appeal dismissed,* 838 F.2d 465 (1988) (quoting *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 567 (1943). Moreover, "Interstate commerce" is a jurisdictional element of the statute. 29 U.S.C. §§ 203(b), 206, 207.

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[22] The Gun-Free School Zones Act of 1990 forbids "any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone." 18 U.S.C. § 922(q)(2)(A).

The following undisputed facts of the instant case demonstrate that labor conditions within the Baltimore City Police Department affect commerce. Officers respond to calls on interstate highways over which interstate commerce passes. Members of the Department monitor and provide law enforcement at bus and train stations where interstate commerce enters and departs. The Department's jurisdiction includes the Dundalk and Locust Point marine terminals, through which interstate commerce passes. Certain investigations and duties, such as homicide and narcotic investigations or fugitive apprehension, are conducted in other states or in conjunction with federal authorities. The Department uses and purchases vehicles and equipment that have been shipped interstate. Clearly these activities have more than a tenuous or trivial effect on commerce. Rather, the Court is persuaded that these various means of providing protection to the public and to businesses and manufacturers engaged in interstate commerce have a significant impact on commerce.

These facts establish that the labor conditions of law enforcement personnel constitute an essential part of the FLSA's regulatory scheme which could be undercut absent such regulation. Moreover, these facts satisfy the interstate commerce nexus required by the FLSA. Because Congress could have rationally concluded that the wage and hour conditions of Department members affect interstate commerce, application of the FLSA to members is within Congress' Commerce Clause power.

Tenth Amendment

Relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *New York v. U.S.*, 505 U.S. 144 (1992), defendants urge the Court to find that the Tenth Amendment precludes Congress from applying the FLSA to State and local police.

In *Garcia*, the Supreme Court spoke directly to this issue, holding that application of the FLSA to public employees does not place an undue burden on State and local governments and, therefore, does not violate the Tenth Amendment. *Garcia*, 469 U.S. at 556. *Gregory* involved application of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, to State Judges. In *Gregory*, the Court ruled that absent a plain statement by Congress indicating that the statute was intended to apply to State Judges, the principles of federalism and the Tenth Amendment precluded such application. In making its ruling, the Court stated that because *Garcia* had "constrained [the Court's] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause," it was deciding only whether Congress had exercised that authority, not whether it had exceeded it. *Gregory*, 501 U.S. 462, 464 (1991); *Brinkman v. Department of Corrections of State of Kan.*, 804 F. Supp. 163, 165 (D. Kan. 1992), *aff'd*, 21 F.3d 370 (10th Cir.), *cert. denied*, 115 S. Ct. 315 (1994). In any event, the FLSA satisfies the plain statement standard of *Gregory* as the statute contains specific standards for employees engaged in "law enforcement activities." 29 U.S.C. § 207(k). Thus, while *Gregory* emphasized that States retain substantial sovereign powers, *Garcia* remains controlling authority here.

Similarly, even though the Supreme Court in *New York v. U.S.* found certain provisions of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021b, *et seq.*, to be inconsistent with the Tenth Amendment, nevertheless it left *Garcia* intact. *New York* at 2420. Accordingly, the Tenth Amendment does not preclude application of the FLSA to the Baltimore City Police Department. *See Ahern*, 807 F. Supp. at 927.

Guarantee Clause in Conjunction with Tenth Amendment

Additionally, defendants contend that the Guarantee Clause, U.S. Const. art. IV, § 4, in conjunction with the Tenth Amendment, precludes federal regulation of the wages that States pay to their police officers. The Guarantee Clause directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. According to defendants, setting wages is an essential government function related to a republican form of government.

Recently the Supreme Court in *New York* suggested that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," however, the Court declined to resolve the justiciability issue. 112 S. Ct. at 2433. In any event, the Court finds that subjecting State and local law enforcement officers to the FLSA's wage and overtime requirements does not deny any State a republican form of government. *Id.*; *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995). Regulating wages of police officers does not limit States' ability to enact, implement and enforce laws. Moreover, states remain free to set base salaries of their law enforcement employees, as well as to bring these employees within the FLSA's exemptions. Thus, because the Court is satisfied that application of the FLSA to defendants does not run afoul of the Guarantee Clause, the justiciability issue need not be addressed.

Necessary and Proper Clause

Defendants' final constitutional challenge rests on the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl.18. This Clause provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution" the specific legislative powers granted by Article I § 8 or by other parts of the Constitution. U.S. Const. art. I, § 8, cl.18. Based on the Court's rulings above that application of the FLSA to State law enforcement officers was a proper exercise of Congress' Commerce Clause authority and is not "destructive of state sovereignty or violative of any constitutional provision," *Garcia* at 554, the statute as applied to defendants is both necessary and proper.

For all of the foregoing reasons, the Court will grant in part and deny in part Plaintiff's Motion for Partial Summary Judgment. Likewise, the Court will grant in part and deny in part Defendant's Motion for Partial Summary Judgment. A formal Order will be entered in conformity with this Memorandum Opinion.

October 30, 1996

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF *
POLICE, ETC., ET AL. *
v. *
BALTIMORE CITY * CIVIL NO.
POLICE DEPARTMENT, ET AL. * B-92-1066
*

****

ORDER

In accordance with the Memorandum Opinion filed today in the above-captioned case, IT IS, this 30th day of October, 1996, by the United States District Court for the District of Maryland,

ORDERED:

(1) That plaintiffs' Partial Motion for Summary Judgment (Paper 114), filed February 28, 1995, BE, and the same hereby IS, GRANTED IN PART AND DENIED IN PART as follows:

(a) the motion is granted in regard to plaintiffs' claim that plaintiffs Joseph Darchicourt, Thomas A. Maly, Stanley F. Mezewski, James R. Sharpe, and William F. Stone are not exempt professional employees;

(b) the motion is denied in all other respects;

(2) That defendants' Motion for Partial Summary Judgment (Paper 116), filed February 28, 1995, BE, and the same hereby IS, GRANTED IN PART AND DENIED IN PART as follows:

(a) the motion is granted in that plaintiff Fraternal Order of Police Lodge 3 BE, and the [sic] hereby IS, dismissed as a party plaintiff.

(b) the motion is granted in regard to defendants' claim that the plaintiffs are salaried employees;

(c) the motion is granted in regard to plaintiffs' claim for liquidated damages;

(d) the motion is granted in regard to the application of the two-year statute of limitations; and

(e) the motion is denied in all other respects; and

(3) That the Clerk shall mail a copy of this Order and the accompanying Memorandum Opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

FILED: January 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-675
(CA-92-1066-B)

FRATERNAL ORDER OF POLICE, Lodge 3, et al

Respondent

versus

BALTIMORE CITY POLICE DEPARTMENT; THOMAS C. FRAZIER

Petitioners

INTERNATIONAL LAWYERS ASSOCIATION

Amicus Curiae

ORDER

Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petition for permission to appeal.

International Municipal Lawyers Association filed a motion for leave to file amicus curiae brief. The Court grants the motion.

Entered at the direction of Judge Luttig, with the concurrence of Judge Motz and Senior Judge Butzner.

For the Court,

/s/ Patricia S. Connor
Clerk

IN THE UNTIED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, et al.
Plaintiffs,
v.
BALTIMORE CITY POLICE DEPARTMENT, et al.
Defendants.

Civil Action No.
B-92-1066

ORDER

On October 30, 1996, this Court issued its opinion and order on the parties cross-motions for summary judgment. Subsequently, the Baltimore City Police Department and Police Commissioner Thomas C. Frazier (the "Defendants") timely requested that the Court alter and amend or, in the alternative, reconsider, its October 30, 1996 opinion and order. This 16th day of December, 1996, the motion is granted and it is hereby

CERTIFIED that the October 30, 1996 order involves four controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The four questions so certified are –

1. Whether the Department of Labor ("DOL") regulations establishing criteria for exemption, 29 C.F.R. Part 541 (with the exception of 29 C.F.R. § 541.5d), are invalid as applied

to States and their subdivisions because they were promulgated without adequate notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553?

2. Whether application of the DOL regulations establishing criteria for exemption, 29 C.F.R. Part 541, to law enforcement agency management by States and their subdivisions is arbitrary, capricious, and inconsistent with congressional intent?

3. Whether application of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and DOL's implementing regulations to States and their subdivisions is a result of a failure in the national political process that places an undue burden on States and their subdivisions within the meaning of *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985)?

4. Whether application of the Fair labor Standards Act, 29 U.S.C. § 201 *et seq.*, and DOL's implementing regulations to police management by States and their subdivisions is constitutional?

IT IS ORDERED that the Court's October 30, 1996 Opinion is amended, in connection with the second issue certified for appeal, as follows:

> First, the Court clarifies that it finds Robert J. di Grazia to be an expert in police management.
>
> Second, the Court notes the fact that the testimony of Mr. di Grazia, as appearing in his Declaration (Def. Exh. 2) and his deposition (Def. Exh. 223), was uncontradicted by any other witness, and is found to be generally credible as

> that testimony relates to the factual bases for Defendants' legal challenge to 20 C.F.R. Part 541 as being unreasonable, arbitrary, capricious, and not within the intent of Congress. The Court declines to rule on the credibility of each aspect of Mr. di Grazia's testimony on those issues because, assuming that testimony to be true, the Court finds, as a matter of law, that Defendants have failed to establish that 29 C.F.R. Part 541 is invalid under the legal standard that those regulations are unreasonable, arbitrary, capricious, or not within the intent of Congress in their application to law enforcement agency management by States and their subdivision. The Court reserves ruling on the credibility of the testimony of Mr. di Grazia as that testimony may relate to any issue on which the Court found, in its Memorandum Opinion dated October 30, 1996, there still exists disputed issues of material fact.

IT IS FURTHER ORDERED that the Court's October 30, 1996 Opinion is amended, in connection with the third issue certified for appeal, as follows:

> First, the Court clarifies that it finds former Congressman John N. Erlenborn and Professor A.E. Dick Howard to be experts on federalism and the national political process.
>
> Second, the Court notes the fact that the testimony of former Congressman Erlenborn and Professor Howard, as appearing in their Declarations (Def. Exhs. 3 and 4) and depositions (Def. Exhs. 222 and 220), was uncontradicted by any other witness and is found to be generally credible.

> Third, the Court declines to rule on the credibility of each aspect of the testimony of former Congressman Erlenborn and Professor Howard because, assuming that testimony is factually true, as a matter of law, Defendants have failed to establish that the FLSA or DOL's implementing regulations are unconstitutional within the meaning of *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

AND IT IS FURTHER ORDERED, that in all other respects, the Court's opinion and order of October 30, 1996 is reaffirmed.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
Senior Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 5, 1999

No. 97-1081
CA-92-1066-B

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*,

Plaintiffs - Appellees.

v.

BALTIMORE CITY POLICE DEPARTMENT;
THOMAS C. FRAZIER

Defendants - Appellants

INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION; THE CITY OF NEW YORK;
SECRETARY OF LABOR

Amici Curiae

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IT IS FURTHER ORDERED that the Amicus International Municipal Lawyers Association's motion for leave to file amicus curiae brief in support of petition for rehearing, Amicus City of New York's motion for leave to file memorandum of law in support of appellants; petition for rehearing, Amicus Secretary of Labor's motion for leave to file response to petition for rehearing, and appellants' consent motion to file reply in support of petition for rehearing are moot.

Entered at the direction of Judge Murnaghan for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

U.S. Const.

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art. I, § 8, cl. 3

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .

art. I, § 8, cl. 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

art. IV, § 4

The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

> **(1)** a military or foreign affairs function of the United States; or
>
> **(2)** a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

> **(1)** a statement of the time, place, and nature of public rule making proceedings;
>
> **(2)** reference to the legal authority under which the rule is proposed; and
>
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

> **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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29 U.S.C. § 213(a)(1)

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§ 213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

> **(1)** any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)

* * *

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50 Fed. Reg. 47,696 (1985)

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29 CFR Part 541

Defining, and DEelimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesman"

SUMMARY: The Wage and Hour Division is considering proposing revisions in Regulations, 29 CFR Part 541 which contain the criteria for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) with respect to employees employed in a bona fide executive, administrative, professional, or outside sales capacity. Those sections under review include the salary test levels as well as the duties and responsibilities tests contained in the regulations. Accordingly, this advance notice of proposed rulemaking is being published to obtain the views of the public on needed changes in the regulations. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for such employees, as well as the interpretations of such definitions.

* * *

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51 Fed. Reg. 25,710 (1986)

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29 CFR Part 553

Application of the Fair Labor Standards Act to Employees of State and Local Governments

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* * *

The immediate impact of the *Garcia* decision was to bring approximately 13.8 million state and local employees under FLSA coverage of which about 7.5 million were subject to the minimum wage and 6.9 million were subject to overtime compensation.

* * *

52 Fed. Reg. 2012 (1987)

29 CFR Part 553

Application of the Fair Labor Standards Act to Employees of State and Local Governments.

* * *

On November 19, 1985, the Department of Labor published in the Federal Register (50 FR 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR Part 541. The comment period ended on March 22, 1986. However, the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for the Department to address this issue in developing a final rule for Part 553.

* * *

TABLE I. – PROJECTED ANNUAL COST, AS OF MAY 1980 AND ANNUAL AVERAGE COSTS FOR 1984 FOR PAYMENT OF OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT PRIOR TO THE 1985 FLSA AMENDMENTS

[Full-time nonsupervisory workers in State and local government, May 1980*]

* * *

Summary

The 1985 FLSA Amendments reduced the fiscal impact on State and local units of governemnt [sic]. The fiscal impact* is summarized as follows:

	Overtime payroll costs
Cost of Garcia Decision (1984 data reference).	$733 million.
Savings resulting from 1985 Amendments (1985 data reference).	517 million.
Remaining cost ______________	216 million.

* * *

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56 Fed. Reg. 45,824 (1991)

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29 CFR part 541

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

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. . . the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the *bona fides* of a claimed exemption under section 13(a)(1). State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

* * *

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57 Fed. Reg. 37,666 (1992)

29 CFR Part 541

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

* * *

It had become apparent to the Department, as a result of court decisions in private litigation and the communications it received, that the previously existing rules and enforcement policy were inadequate for effectuating the statutory exemption in the public sector. The availability of the exemption to public employers was increasingly sharply limited, contrary to the expressed intent of Congress in the 1974 Amendments.

* * *

In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from nonexempt public employees.

* * *

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions as Part 541 at a later date.

* * *

H.R. Rep. No. 93-913 (1974)

FAIR LABOR STANDARDS
P.L. 93-259

FAIR LABOR STANDARDS AMENDMENT OF 1974

HOUSE REPORT NO. 93-913

* * *

LEGISLATIVE HISTORY
P.L. 93-259

TABLE 4 – ESTIMATED NUMBER OF NONSUPERVISORY EMPLOYEES COVERED UNDER THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT, BY INDUSTRY

[In thousands]

Industry	Total number of employees in industry	Number of employees covered	Number of employees not covered or exempt
* * *			
State and local government	6,300	2,764	3,536
* * *			

[Seal]

THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20210

APR 14 1994

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest, that due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I also would urge you to work with the Office of Personnel

Managment (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an undertaking would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed By
Leon E. Panetta
Leon E. Panetta
Director

EXHIBITS REGARDING FAILURE IN NATIONAL POLITICAL PROCESS WHICH UNDULY BURDENS STATE AND LOCAL GOVERNMENTS

EXHIBIT #	DESCRIPTION
Volume I	
3	Declaration of John N. Erlenborn (expert)
4	Declaration of A.E. Dick Howard (expert)
Volume II	
15	H.R. 2936
33	S. 1570
Volume IV	
101	Excerpt from *Interest Group Politics* edited by Allan J. Ciglar (University of Kansas) and Burdett A. Loomis (University of Kansas)
102	Excerpts from *Open Secrets: The Dollar Power of PAC's in Congress*
Volume V	
103	March 16, 1992 *CRS Report for Congress*: Congressional Reform: A Synopsis of Concerns and Proposals
104	July 14, 1988 (revised November 19, 1992) *CRS Report for Congress*: "Soft Money" in Federal Elections: A Legal Analysis
106	April 16, 1993 *CRS Report for Congress*: Mandates and the Congress
107	May 19, 1993 *CRS Report for Congress*: Senate Campaign Expenditures, Receipts and Sources of Funds: 1980-1982

108	July 27, 1993 *CRS Report for Congress*: House Campaign Expenditures, Receipts and Sources of Funds: 1980-1992
110	April 5, 1994 *CRS Issue Brief*: Soft Money in Campaign Finance Reform
111	June 30, 1994 *CRS Issue Brief*: Campaign Financing
112	Excerpts from *Vital Statitistics on American Politics,* 4th ed., Harold W. Stanley (University of Rochester) and Richard G. Niemi (University of Rochester) (Erlenborn Deposition Exhibit 3)
113	May 10, 1979 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 4) (selected pages)
114	February 21, 1982 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 5) (selected pages)
115	November 29, 1983 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 6) (selected pages)
116	December 1, 1985 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 7) (selected pages)
117	May 5, 1988 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 8) (selected pages)
118	October 31, 1989 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 9) (selected pages)
119	December 10, 1991 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 10) (selected pages)

120	April 29, 1993 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 11) (selected pages)
121	June 15, 1994 Federal Election Commission Press Release (Erlenborn Deposition Exhibit 12) (selected pages)
122	August 11, 1994 *Congressional Record,* Vol. 140, No. 111 (Erlenborn Deposition Exhibit 13) (selected pages)
123	October 26, 1993 *Impact of Unfunded Federal Mandates on U.S. Cities* Prepared by Price Waterhouse (selected pages) (Erlenborn Deposition Exhibit 2)
124	September 1992 *Federal Statutory Preemption of State and Local Authority: History, Inventory and Issues,* Prepared by U.S. Advisory Commission on Intergovernmental Relations
125	July 1993 *Federal Regulation of State and Local Governments: The Mixed Record of the 1980's* Prepared by U.S. Advisory Commission on Intergovernmental Relations
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF
POLICE, LODGE 3, *et al.*,
Plaintiffs,
v.
BALTIMORE CITY POLICE
DEPARTMENT, *et al.*,
Defendants.

Civil Action No.
B-92-1066

DECLARATION OF JOHN N. ERLENBORN

I, JOHN N. ERLENBORN, hereby depose and say:

1. I have been engaged by Defendants in this case to testify about and evaluate certain facts, to serve as an expert witness, and to provide opinions, about (a) the federal and state legislative processes, (b) the national, state, and local political processes, and (c) the relationship of Congress to federal agencies, during the period of the late 1950's to the present. I am over twenty-one years of age and make this Declaration based upon my own personal knowledge and if sworn as a witness could testify competently thereto.

2. Attached hereto and incorporated by reference is a true and accurate copy of my resume (Attachment A) which is current except for my retirement from the practice of law in November, 1994. I am an attorney, admitted to practice in the District of Columbia and the State of Illinois. My government and political experience includes

(1) Assistant State's Attorney, DuPage County, Illinois, 1950-1952, (2) Representative in the Illinois General Assembly, 1957-1965, (3) Representative in the U.S. Congress, 1965-1985 (14th District of Illinois, 1965-1982; 13th District of Illinois, 1983-1984). During more than eighteen years, from mid-1966 to January, 1985, I served on the United States House of Representatives House Education and Labor Committee (the "Committee"). I served as Chairman of various subcommittees of the Committee and during my last two years was the Minority leader (ranking Republican) on the Committee. All labor bills, including any Fair Labor Standards Act amendments, originated in the Committee. I was the Republican manager for several attempts, some successful, to amend the Fair Labor Standards Act. However, none of these attempts dealt with the applicability of the Act to state and local governments. I was a Republican candidate for the elective offices in which I served. During the period 1985 through 1994, I served as a Partner, then Of Counsel, with the Washington, D.C. office of the law firm of Seyfarth, Shaw, Fairweather & Geraldson. During this period, I served primarily as a consultant on labor issues, principally employment benefit plans, for government and private sector entities and individuals. Since 1985, I have also met regularly (about once a week when the House was in session) with Republican members of Congress to discuss legislative and political issues. I also closely followed legislative and political occurrences, both in the popular media and the professional trade media.

3. My opinions and inferences in this Declaration are based, in part, on my review of the sources identified

in Appendix B to this Declaration. These are the types of reports, publications, and documents that other elected officials, politicians, Washington, D.C. consultants, and I regularly review and reasonably rely upon in our capacities as federal elected officials, politicians, and consultants in forming opinions and inferences.

4. The facts, opinions, and inferences contained in this Declaration and my deposition of December 6, 1994, are based, in part, upon my observations of the federal legislative and political processes as both a direct and indirect participant in those processes for more than forty years. Over that period of time, I participated in the political process as a Republican party member, as a supporter of various state and federal candidates in many elections, and as a state and federal candidate and elected office holder. During the twenty-eight years that I held elective office, I worked daily in the state and federal legislative processes; worked with other legislators and legislative staffs; and, dealt with constituents, lobbyists and various other interest groups, including state and local government officials, and executive or administrative officials. With many of these individuals and groups, I discussed the federal legislative and political processes, how those processes were operating, and the changes that were occurring in those processes. Politicians, elected officials, and Washington, D.C. consultants, including me, reasonably rely on information obtained from those types of interactions with individuals and groups in order to be able to function effectively as politicians, elected officials, legislators, and consultants and in forming opinions and inferences. I have also studied the federal legislative and

political processes as a participant and as a consultant for clients seeking advice about these processes.

5. I have organized the facts about which I testify and my opinions in the following manner solely for ease of the reader:

I. The cumulative effect of changes within and influences upon the Congress since the 1960s has created a substantial defect in the ability of state and local governments to protect themselves from undue burdens caused by the federal legislative process.

The changes I refer to are:

A. There has been a marked reduction in the importance of the political parties and the influence they exert upon Members of Congress.

Party discipline within the Congress has all but disappeared. It began to erode in the late 1960's, early 1970's. In the past, Members who failed to support their party's position within the Congress would be in danger of losing seniority and being passed over for choice committee assignments, severely restricting their effectiveness in Congress.

In addition, failure to support one's party would have led to substantial electoral difficulties through loss of local party support. By contrast, in recent years, few Members fear the consequences of voting contrary to either the national party position, if there is one, or the desires of state and local officeholders and parties.

State and local officeholders are usually elected through their affiliation with one of the major parties. Formerly, state and local officeholders exercised influence upon Members of Congress through the political parties. Since local party support is no longer as important to Congressional candidates, the state and local officeholders have less influence on Members of Congress.

B. Dispersal of power and function within the Congress has limited the ability of state and local governments to affect the legislative process.

1. In the mid-1970's, the Republicans and the Democrats in the U.S. House of Representatives changed their party seniority rules which governed the selection of committee chairmen and ranking minority members. When the Chairmanship of a Committee was based on seniority, you had a strong, experienced chairman who had the proxy of fellow party members (always Democrats) to speak for the Committee. Such a Chairman could, as a practical matter, often make or revise policy. A good example was Wilbur Mills, Chairman of the House Ways and Means Committee. Since the mid-1970's, chairmen and ranking minority members have been subject to election rather than automatic elevation to these positions by reason of seniority.

This led to chairmen and ranking minority members courting the favor of their committee members and relinquishing much of their power to subcommittee chairmen and ranking members. The result has been to increase greatly the number of points of contact necessary to affect the legislative process.

This means that those interests with greater financial resources and large numbers of lobbyists, such as political action committees (PACs) and national interest groups such as business and unions, have greatly increased their influence in the legislative process. It is axiomatic among Members of Congress that a contributor to campaigns has greater access to Members than someone who does not contribute to their campaigns.

State and local governments lack the necessary resources and lobbying staffs, under these new circumstances, to contact and effectively influence the greatly expanded groups of key lawmakers and their staffs.

2. During the past twenty years, there has been a great increase in the complexity of legislation. Congress legislates in greater detail and often in technical matters not easily understood, even by Members of Congress. This and other factors have led to growth in the size of committee and Members' staffs which has greatly increased the number of necessary contacts. To illustrate the point, staff members of the House and Senate totaled 3556 in 1957 and 11,572 in 1991. N. Ornstein, T. Mann and M. Malbin, Vital Statistics on Congress, 1993-1994 (Congressional Quarterly, Inc.) at 128. This expanded number of potential contacts benefits those interests with greater financial resources.

C. Growing annual deficits and the introduction of a Congressional budgeting process have changed major factors influencing the legislative process to the substantial detriment of state and local governments.

The Congressional Budget Act of 1974 changed the budget process within Congress. As a result, Congress annually adopts a budget for the succeeding fiscal year. Frequently, a reconciliation bill must be enacted to adjust and limit entitlements and appropriations to conform to the budget. This has led to an internal discipline that bills approved must be "budget neutral;" that is, any new expenditures must be offset by new revenues or reductions in expenditures elsewhere.

This discipline, together with growing attention to annual deficits and the rapidly and very substantially increasing national debt, has led Congress to adopt means outside the budget to fund new programs. Unfunded, or partially funded, mandates on state and local governments are now often used to require them to administer and to fund activities pursuant to Congressional enactments. (See IV infra for example.) This allows Members to take the credit for addressing a problem and passing legislation but the cost would be passed to someone other than the federal government.

Representatives of state and local governments are eloquent in expressing their inability to restrain Congress from imposing these costly mandates.

D. The general membership of the Congress has less opportunity to affect the content of legislation.

"Megabills," *i.e.*, bills of large size and great complexity, have been increasingly used as vehicles for the passage of proposals which circumvent the normal legislative process. Budget Reconciliation Acts (BRA) and tax bills often contain nongermane provisions which are not considered on their merits.

Over the past twenty or twenty-five years in the House of Representatives it has become the norm, rather than the exception, for bills to be considered under closed or restrictive rules. This has limited the ability of members of the House to offer amendments to legislation before it is voted on for passage. For example, as shown in the Congressional Record of the House of Representatives of August 11, 1994, at H 7927, in 1977-78, only 15% of legislation left the House Rules Committee with restrictive rules. This meant that amendments to the legislation could be offered on the vast majority of legislation by any member of the House. By 1993-94, 73% of legislation was subject to restrictive rules which limited the ability to offer amendments to most legislation. This usually meant that members had to vote on legislation in the form offered by Committee. This change was caused by the Democratic leadership of the House which wanted to protect legislation from amendment on the floor.

II. Outside influences on the legislative process have changed and greatly reduced the ability of state and local governments to as effectively participate in the federal political and legislative processes.

Grassroots lobbying directed by national interest and organized groups has become a favored and effective method of influencing legislators. Interest groups with large numbers of members, and other affluent interest groups, clearly make increasing use of their financial advantages by contributing to Members of Congress and national political parties and by financing lobbying to directly influence Congressional action. For example, labor unions, including the American Federation of State, County and Municipal Employees, have had greater impact on the Fair Labor Standards Act in the Congressional process. The extension of the Fair Labor Standards Act in 1974 to cover state and county employees was a result of lobbying on the part of unions representing them. State and local governments, and their officials, are limited in their ability to employ financial resources or to organize large grassroots lobbying campaigns. They are frozen in the past in their ability to affect the political and legislative process.

III. The changing manner of conducting campaigns for Congress has reduced the influence of state and local governments with Members of Congress.

A. Candidates for Congress in the past usually drew upon state and local resources in financing their campaigns and as a major source of unpaid volunteer workers. In the 1950's and early 1960's, most campaign contributions were from individual constituents.

B. The growth of political action committees (PACs) has resulted in candidates for Congress relying on new campaign funding sources. Formerly, candidates for Congress relied upon state and local sources for most of their financing. National interest groups and PACs have become a major source of campaign funding. State and local governments, generally, are unable to maintain PACs.

C. Unpaid volunteers used to be the principal source of workers in Congressional campaigns. A greater percentage of workers for most Congressional elections are now paid. Professional managers, consultants, and pollsters are common.

Unpaid volunteers generally are residents of the candidate's constituency. In the 1950's and 1960's, many of these constituents were employees and officials of state and local governments who were members of the same party and generally shared the same political philosophy as the Congressional candidate. That personal and professional contact of state and local government employees conveyed their interests and perspectives to the Congressional candidates. The relative influence on Members of Congress of these volunteers has diminished as the importance of national interest groups has increased. State and local government officeholders as constituents have experienced this loss of influence on Members of Congress.

IV. The growth of unfunded mandates and preemptive legislation is a prime example of state and local governments' inability to protect their interests in the federal legislative process.

A. One of the best examples of the inability of state and local governments to prevent federal legislation which imposes undue burdens upon them is the number and cost of federal unfunded mandates enacted in the past two decades. In my opinion, there is a link between unfunded mandates and the changes in the legislative and political processes which I describe in this Declaration. It would have been much more difficult to impose such mandates when mayors, governors, and other state and local officials played a more important political role in a member's election or reelection. Those state and local officials also influenced a much greater percentage of the electorate before these political changes occurred.

A survey by Price Waterhouse for the U.S. Conference of Mayors collected data on the costs of some of these mandates. Although Price Waterhouse noted that there were many more mandates, the survey was conducted as to only ten. The total estimated costs of these ten federal mandates to the cities for FY 1993 was $6.3 billion. Estimated costs for fiscal five years 1994 through 1998 total $54.0 billion. For the City of Baltimore, Maryland, the FY 1993 costs of the ten mandates were $83,712,370.

The FY 1993 costs attributable to the Fair Labor Standards Act for the reporting cities were $212,123,000. For FY 1994 through 1998, these costs were estimated to be $1,121,524,000.

The survey noted that cities reported that unfunded federal mandates consume an average of 11.7% of their locally raised revenues.

B. Another example of burdensome federal legislation affecting state and local governments is the number of federal statutes passed in recent years to preempt the authority of these governments. A total of 30 such statutes were enacted prior to 1900. In the next five decades, congressional action to preempt averaged less than 22 statutes per decade. The numbers radically grew: 47 in the 1960's, 108 in the 1970's, and 100 in the 1980's. (See Sources 1 and 2 listed on attached Appendix B.)

6. Based upon my education, training, and experience as an active participant in federal and state legislative and political processes, I provide the opinions contained in my December 6, 1994 deposition, and this Declaration with the reasonable certainty of one having my qualifications and experience in those fields.

7. Based upon the foregoing, it is my opinion that the cumulative effect of changes in the federal legislative and political processes since the 1960's constitute a substantial failing and defect in those processes resulting in an undue burden upon state and local governments. The result of this substantial defect is, and has been since the late 1970's, effectively to preclude state and local governments from accomplishing their goals or protecting their interests in the federal legislative and political processes. This is particularly so when those goals or interests are opposed on specific issues by interest groups, such as environmental groups or labor unions, which have been made substantially more effective in those processes by

the changes described herein. The fact that Congress, on occasion, may pass legislation, parts of which may benefit state and local governments does not change my opinions in this Declaration. There are many reasons other than the ability of state and local governments to effectively compete in the federal legislative and political processes for such results. For example, the interests groups with which state and local governments cannot generally compete may join with, or at least not oppose state and local government interests on a particular piece of legislation. Or, benefiting state or local governments by a particular piece of legislation may be perceived by legislators as obviously the right thing to do with minimal political cost for enacting the legislation. The defect in the national political processes brought about by the cumulative changes discussed above is that the state and local governments are now politically unable to be effective on issues important to them when opposed by groups, which have been greatly benefited by the changes as described above.

The terminology I have used in this Declaration with regard to "failings," "defects," and "undue burdens" is intended to have its normal English language meaning and is not intended to have any technical or special legal meaning.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ John N. Erlenborn
JOHN N. ERLENBORN

January 26, 1995
EXECUTED ON (DATE)

Washington, D.C.
LOCATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*,

Plaintiffs,

v.

BALTIMORE CITY POLICE DEPARTMENT, *et al.*,

Defendants.

Civil Action No. B-92-1066

DECLARATION OF A.E. DICK HOWARD

I, A.E. DICK HOWARD, hereby depose and say:

1. I have been engaged by Defendants in this case to testify about and evaluate certain facts, to serve as an expert witness, and to provide opinions, about (a) the federal legislative process, (b) the national, state, and local political processes, (c) the relationship of Congress to federal agencies, and (d) the interaction of the foregoing in the process of federalism, and in particular the changes which have occurred in the process of federalism during the period of the late 1950's to the present. I am over twenty-one years of age and make this Declaration based upon my own personal knowledge and if sworn as a witness could testify competently thereto.

2. Attached hereto and incorporated by reference as Appendix B is a true and accurate copy of resume materials which highlight some of my education and some of my study and experience in the process of federalism.

My qualifications include a law degree from the University of Virginia Law School, where I am a Professor, a Rhodes scholarship at Oxford University, and clerkship to Mr. Justice Hugo L. Black of the United States Supreme Court. I have authored numerous publications and given many presentations on the subjects of federalism and the constitutional process. In addition, as discussed at my deposition on December 22, 1994, the following are illustrative of the various ways in which I have been involved in work on issues of federalism, both with public and private groups and agencies:

FEDERAL GOVERNMENT

Federal executive branch. During the Reagan Administration (in the early 1980s), Attorney General Edwin Meese asked me to serve as a member of the U.S. Department of Justice's task force on federalism. That task force included top-ranking officials of the Department, officials of other federal agencies, and private citizens. The task force was charged with reviewing federal policies and actions affecting federalism.

Federal legislative branch. When Senator John Tunney chaired the U.S. Senate Judiciary Committee's Subcommittee on Constitutional Rights, I served (in the mid 1970s) as the subcommittee's chief consultant. In that capacity, I was asked to advise on legislation and other matters. For example, I wrote a detailed study of problems in the area of fair trial and free press.

U.S. Advisory Commission on Intergovernmental Relations.

I served as a member of ACIR's Task Force on Federal Courts and Federalism. This group, made up of state and local government officials, experts on federalism, and others, enquired into problems of federalism in the courts, such as federal preemption, section 1983 litigation, etc.

In 1984 the Commission marked its 25th anniversary. For the occasion, the Commission commissioned papers, including one which I wrote, to assess the health of and prospects for the federal system. These papers were published by ACIR under the title, *Emerging Issues in American Federalism.*

STATES COLLECTIVELY AND OTHER GROUPS

State and Local Legal Center. The Center operates under the auspices of the Council of State Governments, the National Association of Counties, the National League of Cities, the National Conference of State Legislatures, the National Governors' Association, the International City Management Association, and the U.S. Conference of Mayors. I have served as a member of the Center's Advisory Committee, which serves as a sounding board to shape state and local government responses to legal and constitutional issues affecting those governments. For example, I was party to the board's discussions, in 1985, of ways in which the state and local governments, individually and collectively, should respond to the Supreme Court's decision in *Garcia.*

National Governors' Association. The Association has called upon me for my views on various problems of federalism. For example, they commissioned me to write a study published in 1980 under the title, *I'll See You in Court: The States and the Supreme Court.*

Committee on Federalism and National Purpose. Senator Daniel J. Evans and Governor Charles S. Robb co-chaired the Committee on Federalism and National Purpose. The Commission's final report, *To Form a More Perfect Union,* released in December 1985, made recommendations on such questions as devolution of government functions, federal funding for state and local programs, and intergovernmental relations. I served as a member of the Committee, along with such other members as Bruce Babbitt (then Governor of Arizona), Stuart Eizenstadt (a key figure in the Carter Administration), Representative Richard A. Gephardt, Alice Rivlin (then of the Brookings Institution [sic]), and Richard W. Williamson (formerly President Reagan's adviser on federalism issues).

Committee on the Constitutional System. Created and chaired by Lloyd Cutler and Douglas Dillon, this committee has taken an ongoing look at major structural questions in the federal system. I am a member of the committee and of its executive committee.

Conference of Chief Justices. At the Conference's request, I edited essays by the chief justices of the original thirteen states regarding those states' contributions to American constitutionalism. The resulting book was published by the National Center for State Courts.

VIRGINIA

In addition to experience like that illustrated above (all the above examples are at the national level), I have been deeply involved for over 25 years in federalism issues within the Commonwealth of Virginia. Examples include the following:

Counselor to the Governor. From 1982 to 1986, I served as Counselor to the Governor, having been appointed by Governor Charles S. Robb. During this period, while I continued my regular academic duties at the University of Virginia, I spent a day or more each week in Richmond. In addition, I was on call (by telephone or otherwise) in Charlottesville to respond to requests or queries from the Governor or from his staff. I advised the Governor and his staff on a wide range of issues, including legal, constitutional, personnel, legislative and other matters. I also represented the Governor, on request, at meetings of national organizations, such as the National Governors' Association Legal Committee.

Commission on Constitutional Revision. In 1968-70, I served as the Executive Director of the Virginia Commission on Constitutional Revision. Created by an act of the Virginia General Assembly, the Commission, in their final report, proposed an extensive overhaul of Virginia's Constitution. Major proposals included reform of the judicial system, a mandate of quality education, annual sessions of the legislature, and a new environmental article, as well as a complete revision of the constitutional document itself. Among the tenets animating the Commission's work was, in the language of the Commission's report (which I wrote for the Commission), "The Commission has proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as to the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government." Members of the Commission included Lewis F. Powell, Jr. (later a justice of the U.S. Supreme Court), Hardy C. Dillard (subsequently a member of the World Court at the Hague), Colgate Darden (a former Governor of Virginia), and Oliver Hill (a leading civil rights lawyer).

After the Commission completed its work, I then served as Counsel to the General Assembly during the 1969 and 1970 sessions, when the legislature acted on the Commission's report. Finally, I directed the successful referendum campaign (November 1970), in which the new Constitution was approved by a vote of 72%. In that campaign, I organized a state campaign (TV and radio advertising, a speakers' bureau, informational leaflets, etc.) and set up local campaign committees in each of the counties and cities in Virginia. Taking leave of absence from the law faculty, I stumped the state, speaking as many as four and five times a day near the end of the campaign.

Equal Rights Amendment Task Force. After congress sent the proposed Equal Rights Amendment to the states for their action, Virginia's General Assembly asked me to chair a task force on the amendment. The charge of the task force was to report to the legislature on the changes that would need to be made in Virginia law were ERA to be ratified by the states.

Commission on Campaign Finance and Government Ethics. In 1992, Governor L. Douglas Wilder appointed me to chair his Commission on Campaign Finance Reform, Government Accountability, and Ethics. This bipartisan commission included, among its members, M. Caldwell Butler (former Republican Congressman), Paul Goldman (chairman of Virginia's Democratic Party), Raymond H. Boone (publisher of Virginia's leading paper focused on an African-American readership), and political scientist Larry Sabato. The Commission made 37 recommendations on campaign finance, lobbying, government accountability, and conflicts of interest. These reforms, framed in terms of state law, took account, of course, of the backdrop of federal law and practices.

Advice to governors, state officials and legislators. Apart from formal service on commissions and task forces, I am called upon on a frequent and regular basis by legislators, executive officials, lawyers in the Attorney General's Office, and others in state and local government seeking advice on a range of issues. These frequently touch areas where state and federal law intersect.

Testimony before legislative committees. I am often called upon to testify before committees of the Virginia General Assembly, typically by the committee itself. Frequently the subject at hand is one that involves some aspect of federalism, for example, recent testimony on a proposed constitutional amendment that would enable states to initiate (subject to congressional veto) the process whereby amendments to the Constitution could be laid before the states for ratification or rejection.

Governor Allen's Advisory Commission on Federalism. Most recently, I have accepted Governor George Allen's appointment to serve as a member of his Commission on Federalism. The Governor looks to this commission to explore ways of achieving constitutional and legal reform aimed at making the federal system healthier and the states more responsive. Members of the commission include state and local government officials, college presidents, lawyers, civic leaders and others (among the names that would be recognized nationally are former judge [sic] Robert Bork and Representative Thomas Bliley).

INTERNATIONAL

Advice to constitution-makers and others abroad. I have been invited to consult with drafters at work on new constitutions in a number of countries, including Brazil, Hong Kong and the Philippines. Since the collapse of the Communist system, I have worked with constitution-makers in Hungary, Poland, Czechoslovakia, Bulgaria, Romania, Albania, the Russian Republic, and Lithuania. Most recently, I have consulted with drafters in South Africa and Malawi. Invitations have come from various sources, including parliaments, presidential or prime ministers' offices, ministries of justice, etc., as well as from private organizations (such as the American Bar Association's Central and East European Law Initiative).

In addition to consulting on the making of constitutions, I have been asked to advise on other problems of building constitutional democracies, such as creating an independent court system, nurturing local government, etc. Often these consultations deal with matters of government structure and process, for example, allocation of powers and functions between a central government and regional and local governments.

Conference on Security and Cooperation in Europe. The Conference on Security and Cooperation in Europe (it recently substituted "Organization" for "Conference") is a regional organization that concerns itself with issues of security, human rights, etc. Among other things, it monitors the Helsinki process (human rights). I have served as a member of the U.S. delegation at three CSCE meetings — those in Geneva (1991), Helsinki (1992), and Warsaw (1993). I took an active part in those discussions, making floor statements, meeting with members of other delegations, etc. My principal contributions were in the area of democratization, institution-building, and human rights.

3. My opinions and inferences in this Declaration are based, in part, on my review of the sources identified in Appendices A and C to this Declaration. These are the types of reports, publications, and documents that I and other individuals who study and work in the process of federalism regularly review and reasonably rely upon in forming opinions and inferences.

4. The facts, opinions, and inferences contained in this Declaration and my deposition of December 22, 1994, are based, in part, upon my observations of the federal and state legislative and political processes as both a direct and indirect participant in those processes since the late 1950s. Over that period of time, I have participated in the political process as a supporter of state and federal

candidates and issues in various elections. My observations include my personal experience since the late 1950s, as described above, such as working with Virginia governors, the Virginia legislature, the federal Congress, the federal bureaucracy, and the federal executive branch; serving on task forces, study commissions, and committees; and being involved on an ongoing basis with the people who are the decision makers, buttressed by my interest from a scholarly perspective as a student of the process.

With many of these individuals and groups, I have had frequent occasion to discuss and analyze the federal legislative and political processes, how those processes have been operating, and the changes that have been occurring in those processes. Experts who work in and study the process of federalism, including myself, reasonably rely on information obtained from these types of interactions with individuals and groups and studies in order to be able to form opinions and inferences about the process of federalism, including its political, executive, legislative, and legal components. In addition, and specifically related to this case, in 1985-86, I served on the board of the Washington, D.C. based State and Local Legal Center, which was composed of representatives from most of the major state, county, and local government associations. Following the decision of the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which applied the Fair Labor Standards Act to state and local governments, the board served as a sounding board discussing legal and political strategy with the state and local government groups lobbying Congress to exempt state and local governments from the Fair Labor Standards Act.

5. I have organized the facts about which I testify and my opinions in four subsections solely for ease of the reader. Part I sets out the legal structural changes which have occurred during the history of the United States, especially in recent years, with a focus on changes which have affected the franchise. In my opinion, the constitutional structure assumes a continuing state and local government role by creating a federal system in which the states are component units. The Constitution did not create a central or national government but a federal government.

I. Any judgment about failings in the political process as they affect state and local governments must take into account systematic structural changes that limit or displace the ability of the states and local governments to control the shape of representation in the national legislature, in particular, control of the franchise and of congressional apportionment. By the "national political process," I mean those ways by which we implement national policy by laws, regulations, or other legal norms. These structural changes are not themselves failings in the process, but they create the legal context in which changes in the political process take on heightened significance.

As to displacement of state control of the franchise, I note:

(a) Constitutional amendments — the Fifteenth Amendment (race, color or servitude), the Nineteenth Amendment (suffrage for women), Twenty-Fourth

Amendment (poll tax in federal elections), and the Twenty-Sixth Amendment (18 year old vote).

(b) Judicial decisions, including those invalidating length of residence requirements (*e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972).

(c) Congressional legislation, notably the voting Rights Act of 1965 and its amendments, and implementing federal executive branch actions.

As to displacement of state discretion in the creation of congressional districts, the most important limits are those imposed by *Wesberry v. Sanders,* 376 U.S. 1 (1964), requiring that districts be based on population, and *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), requiring that states seek "precise mathematical equality" among districts. Other limits on state power regarding congressional districts include the justiciability of claims of political gerrymandering, *Davis v. Bandemer,* 478 U.S. 109 (1986), and claims of impact on racial minorities, *White v. Rogester,* 412 U.S. 755 (1973).

In assessing the relevance of these structural changes, one should note that reliance has shifted from those vehicles of change (constitutional amendments) in which the states have a direct and formal role to those in which they do not (judicial decisions, Acts of Congress, and executive administrative action). The last of the constitutional amendments, the Twenty-Sixth, became effective in 1971.

II. Against that structural backdrop of amendments, decisions, laws, and implementing regulations, I find that, since approximately 1960, significant factors in the political process — among them, political campaigns — are important elements in causing the failure of the national political process to assure the states and local governments of the place in that process that the constitutional system assumes they will have. Those factors include the following:

> (a) The role of money is a central element in undermining the place of states and local governments in the national political process. In recent years there has been a dramatic rise in the number and influence of Political Action Committees ("PACs"); there are thousands of them today. In the 1992 Senate and House elections, almost a third (32%) of general election candidates' funds came from PACs — up from less than 20% in 1972. In the 1980s, the members of the House Education and Labor Committee and the Senate Labor and Human Resources Committee were special recipients of labor PAC money, especially government employee PAC money, from such unions as the American Federation of State, County and Municipal Employees. State and local governments do not have PACs. Based upon my experience and review of the literature in the field, the two most important generic kinds of PACs and interest groups are business and labor. A specific example was the attempt in 1985 by state and local governments to lobby for an exemption from the Fair Labor Standards Act following the *Garcia* decision. Since business had generally been covered by the Act since 1938, it had no incentive to use its resources to assist state and local governments in this lobbying effort. This left state and local governments head-to-head against labor. The state and local government representatives

involved in that lobbying effort regularly communicated with the State and Local Legal Center board, of which I was a member, that labor had a lock on the House Labor Committee and that there was no chance for an exemption from the House.

(b) Campaigns for seats in the Senate and House have been marked by soaring costs. The cost of running for a seat in the House tripled from 1980 to 1992. This is clear from the Congressional Research Service statistical data on such costs and my own personal experience of participating in state and federal election campaigns since 1953. For example, I was chairman of a major statewide issue campaign in 1970. The total cost of the campaign was $100,000. Today, such a campaign would cost millions of dollars.

(c) Special interests have become major players in dominating the shape of legislation. Thousands of lobbyists and consultants maintain a regular presence on Capitol Hill, using a network of contacts to influence the outcome of the legislative process. In the past two decades, increasingly the drafting of legislation, the course of its passage, and its regulatory implementation has been guided by what one may call the "iron triangle" of (1) the critical committee or subcommittee chairman, (2) the relevant federal agency, and (3) the particular interest group. In the case of labor legislation, that would be the chairmen of the House and Senate Labor Committees, members of the Department of Labor, and the labor unions. It is at this submerged level that a great deal of real policy making is going on — primarily by people that have no accountability to the electorate.

(d) There has been a decline in the role of state-based political parties, as national special interests have become increasingly influential. Having been active for many years in the work of state political parties and having been a delegate to state conventions, I have observed these changes. An example of the decline were the changes caused by the McGovern "reforms" in the early 1970s. Delegates to national party conventions were elected in primaries rather than chosen by state parties. State parties today are not important players, as they were thirty years ago. They have been replaced by PACs and interest groups. This collapse of state political parties is one of the factors which have reduced the ability of state and local governments to impact the national political process.

(e) Electronic media advertising has become more important and expensive.

(f) States and local governments have no mechanism to compete financially.

III. The nature and focus of federal decision-making, especially the shape of federal regulatory activities, have shifted in fundamental ways in recent years. These changes have profoundly undermined the ability of states and local governments to be influential in that decision-making process. A hallmark of this shift has been a move toward decisions of a kind that evade the norms of accountability assumed as an element of constitutional government. Significant factors include the following:

(a) There has been explosive growth, especially since the 1960s, of the regulatory state.

This period has seen the enactment by Congress of sweeping new environmental, health, safety, and other legislation, all of which, of course, require extensive agency implementation.

(b) Federal preemption of state and local laws and activities has significantly increased, both in pace and breadth, since the 1960s. Of all the significant preemption statutes enacted by Congress since 1789, over half have been enacted since 1969. Preemption is often not even stated explicitly in a federal statute; frequently federal courts or administrators infer preemption.

(c) Since the 1960s, federal regulatory activity has increasingly taken the form of mandates to states and local governments. In the 1970s, Congress enacted 22 statutes imposing new regulations on states and localities or significantly expanding new programs. In the 1980s, the number of such mandates increased to 27. The mandates imposed significant unfunded costs on states and local governments. The Fair Labor Standards Act is the classic unfunded mandate.

(d) Congress increasingly attaches conditions to federal grants it makes to the states and local governments. There is essentially no judicial review of those conditions. Conditions no longer are necessarily related to a grant's legislative purpose but can be, and are, used to achieve other, unrelated ends.

(e) Much real power in decision-making has shifted away from Congress as a whole. We have seen, especially since the 1960's, the emergence of a new class and network of public

> administrators. This development is made possible by the expansive delegation by Congress of authority to administrative agencies and the consequent creation of vast bureaucracies. The key figures in this network of decision-makers are officials and employees of the agency, individual legislators (such as subcommittee chairpersons), organized interest groups, and others not directly accountable to the electorate. For example, assuming the issue of whether local policemen and firemen should be paid overtime is an appropriate federal determination, it should be a legislative policy decision. One of my conclusions is that that is the sort of issue that gets pushed off and decided outside the floor of the legislative chamber.

This section illustrates the severing of the American principle of accountability which lies at the basis of democratic government and which assumes you elect people to make decisions and you hold them accountable for those decisions.

IV. Finally, my assessment of changes in the political process that make it fail to protect the states' and local governments' place in the constitution system would include factors internal to Congress itself. These would include:

> (a) Legislators' inability to keep abreast of legislation, both because of its volume and its complexity, especially during the process of amending and enacting legislation. Both Senators and members of the House have been very candid in discussing these circumstances. They

admit that they do not have time fully to consider the policy issues of legislation but are driven by the pressures of the moment.

(b) The roles of greatly expanded House and Senate staffs and consultants in the drafting of legislation.

(c) Reconciliation of House and Senate versions of legislation by staff members, apart from and sometimes without the use of a conference committee.

(d) Lack of serious debate or discussion on how legislation will affect states, local governments, or federalism. This is another example relating to the applicability of the Fair Labor Standards Act to state and local governments.

(e) The practice of attaching unrelated amendments to legislation, especially to budget bills.

The foregoing sections I to IV are examples of the numerous and significant changes in the national political process since approximately 1960. In my opinion, these changes cumulatively constitute a substantial failure or defect in constitutional federalism which effectively precludes state and local governments from having the voice contemplated in the cooperative federalism inherent in the structure of our federal government.

6. Based upon my education, training, and experience as a student of and active participant in federal and state legislative and political processes, I provide the opinions contained in my December 22, 1994 deposition, and this Declaration with the reasonable certainty of one having my qualifications and experience in those fields.

7. Based upon the foregoing, it is my opinion that the cumulative effect of these changes in the federal legislative and political processes since the 1960s constitute a substantial failing and defect in those processes resulting in an undue burden upon state and local governments. The result of this substantial defect is, and has been since about 1980, effectively to preclude state and local governments from accomplishing their goals or protecting their interests in the federal legislative and political processes. This is particularly so when those goals or interests are opposed on specific issues by interest groups, such as environmental groups or labor unions, which have been made substantially more effective in those processes by the changes described herein. This is not a function of the cyclical ebbs and flows which occurred in the first approximately 175 years of federalism. It is a new phenomenon, a sea change. State and local governments have been crippled in their ability to convey to Congressmen and their staffs the consequences of their legislative decisions on state and local governments. I am not commenting on policy, but on defects in process. A democratic government presupposes a relatively healthy process.

8. That Congress may pass legislation which may sometime economically or in some other way benefit state and local governments does not change my opinions. There may be a variety of reasons why such legislation would be passed unrelated to the power of state and local governments to participate effectively in the national political process. The key issue is whether state and local governments can participate effectively in the process when opposed by interests which have benefitted from

the changes in process I have described. In my opinion, state and local governments have not been able to participate effectively in such circumstances.

9. The terminology I have used in this Declaration, my December 22, 1994 deposition, and my report, with regard to "failings," "defects," and "undue burdens" is intended to have its plain English working definition. I did not intend those terms in a legal or technical context.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ A.E. Dick Howard
A.E. DICK HOWARD

January 31, 1995
EXECUTED ON (DATE)

Charlottesville, Virginia
LOCATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*, **Plaintiffs,** v. **BALTIMORE CITY POLICE DEPARTMENT, *et al.*,** **Defendants.**	**Civil Action No. B-92-1066**

DECLARATION OF ROBERT J. di GRAZIA

I, ROBERT J. di GRAZIA, hereby depose and say:

1. I have been employed by Defendants in this case to testify and to evaluate certain facts, to serve as an expert witness and to provide opinions about (a) police management, particularly the ranks of Sergeant and Lieutenant, generally, and in the Baltimore Police Department, specifically, and (b) whether certain job titles, duties and procedures as described within 29 C.F.R. Part 541, giving the words and phrases considered their plain English meaning, have any relationship to the duties, ranks and management of police agencies, including the Baltimore Police Department. I am over twenty-one years of age and make this declaration based upon my own personal knowledge and, if sworn as a witness, could testify competently thereto.

2. Attached hereto and incorporated as Appendix A are a list of resources I considered in rendering my opinions in my report of August 15, 1994, my deposition on January 19, 1995, and this Declaration. These documents and resources are the types of materials reasonably relied upon by experts in police management in forming their opinions and references.

3. Attached hereto and incorporated as Appendix B is my resume which includes a B.A. degree from Boston College, serving as a Deputy Sheriff, Marin County Sheriff's Department (approximately 100 personnel) (1959-1960); Patrol Officer, Sergeant, and Chief of Police, Novato, California (35 employees) (1960-1969); Superintendent of Police, St. Louis County, Missouri (500 employees) (1969-1972); Police Commissioner, Boston, Massachusetts (3,000 employees) (1972-1976); and Director of Police, Montgomery County, Maryland (1,000 employees) (1976-1979). From 1979 to 1981, I worked part-time for the Police Executive Research Forum, Washington, D.C., participating in the development of Standards for Accreditation of Law Enforcement Agencies. From 1979 to the present, I have served as a consultant and expert witness on law enforcement matters. Throughout my career, I have taught and written about police procedures. I have qualified and testified in over two hundred trials as an expert witness on police procedures. In addition, I have served in the United States Coast Guard and been employed in the private sector. In 1949, I started as a supply clerk with Macy's Department store in San Francisco, California. By 1957, I held the position of manager of almost all of the non-retail departments of the store including approximately 100 employees on normal

schedules and 500 employees during the Christmas season.

4. In addition to my education, training and experience in police management, the reasons for my professional opinions in this matter are based on the following:

A. Police are necessarily organized in a military rank structure so that in emergency, life threatening situations, subordinates will immediately follow the lawful orders of supervisors. This is regardless of their normal working relationship or the daily jobs performed by either.

B. Most members of a police agency wear uniforms bearing rank insignia and generally all carry identification establishing rank. Because of the need for high morale, discipline, and mutual confidence in a crisis, the police agency's effort to establish uniformity of attitude, skill, and effectiveness requires emphasis on training and procedures to a much higher degree than civilian or other governmental organizations.

C. Regardless of the daily job performed by each officer, their pay and position in the organizational structure is determined primarily by rank which is achieved at the sergeant and lieutenant levels by promotion from within the organization. Promotion is based primarily on a uniform test for each rank which emphasizes the common knowledge, skill, management and administrative responsibilities for that rank rather than the various daily duties which each officer of a given rank might have.

D. Unlike the private sector and other governmental agencies, departments and subdivisions within a police department may be created, dropped, or modified to meet changing, perceived threats to the community. Police management structure and operations may have no private sector or other governmental counterpart, for example, undercover work, which may involve officers of different ranks, sometimes performing common tasks.

E. In the police field, sergeants and lieutenants are supervisors and are considered key parts of the management team.

F. Generally, sergeants and lieutenants coordinate, supervise and plan for the actions of their subordinates. They are also responsible for the effective utilization of disciplinary measures as well as the performance evaluation of their subordinates.

It is within this general framework that I have formulated my opinions.

5. Police department management is different from the management of other governmental agencies where seniority does not necessarily give someone the authority to give orders. Police ranks have supervisory authority based on rank structure. Even when supervisors are performing similar duties alongside subordinates in police agencies, they are still supervisory because of the continuing need for discipline and evaluation. Part of the oversight duties of lieutenants and sergeants is to insure that subordinate officers follow established department policy and procedures. If a number of officers of different

ranks respond to a crisis, the highest ranking would be in charge.

6. The State of Maryland Training Commission (the "Commission") for police considers sergeants and lieutenants to be managing supervisors, responsible for training, performance evaluations, grievances, inspections, handling of complaints, investigating those complaints, motivating and counseling of personnel, and displaying leadership. The Commission has training requirements for each rank. During the two years I was Director of Police, Montgomery county, Maryland, I worked with the Maryland Training Commission and its regulations. Training relating to sergeants and lieutenants was general for those ranks across the State and did not vary from city to city. California, Missouri and Massachusetts, where I also was the chief executive of law enforcement agencies, have similar training programs which were general for each rank and did not vary from city to city.

7. All of the police departments I have been in had the ranks of Sergeant and Lieutenant. The duties of sergeants and lieutenants are the same for all jurisdictions. Examinations are used for promotion to sergeants and lieutenants. Promotional testing for sergeants and lieutenants, including those in the Baltimore Police Department, are not job specific but test management, supervision and administration. I had input on Sergeant and Lieutenant promotion examinations in each jurisdiction in which I was the chief executive. Additionally, I had input for job descriptions in each of the jurisdictions in which I was the chief law enforcement officer. Job descriptions are generally the same for Sergeant and Lieutenant in all jurisdictions.

I am familiar with the term "working-foreman" and sergeants and lieutenants are not working-foremen because they are responsible for many areas of management and supervision. When they are on the street at a potential crime scene, their task would not be just to work like patrol officers, but to be in charge of what was occurring at that particular scene.

8. Simply looking at the requirements of law enforcement agencies generally and the Baltimore City Police Department specifically, lieutenants and sergeants are the first and second lines of management and supervision of the much larger number of police officers who deliver police services.

The particular importance that sergeants play in managing a police agency is demonstrated in the Wilson and McLaren book on Police Administration. On page 146 the following is stated:" *The Sergeant: Key to Good Discipline.* Sergeants play a more important role as department disciplinarian than any other rank. Wisely selected superior officers need corrective action less frequently than patrol officers and others at the level of execution. Sergeants supervise the greatest number of subordinates, including officers who are inexperienced, who have not been completely trained on the job and those who have lost promotional opportunities because of weaknesses that need correction. Successful control of the subordinates by the sergeants is reflected in an improved quality of work and improved public relations; when the sergeants maintain a close and firm supervision, the likelihood of citizen complaints is lessened considerably. In addition to these immediate advantages, subordinates under wise supervision are thus schooled to become more effective superior officers, an important long-range advantage." Throughout the three books listed in Appendix A and which have over the years been the reading resources for promotional examinations for lieutenants and sergeants in the Baltimore City Police Department, it is illustrated how extremely important the correct supervisory and management skills are at lieutenant and sergeant levels. Those two positions more than any other in a police agency control how effective law enforcement agencies function in the required tasks.

My review of the duties required of sergeants and lieutenants in the Baltimore City Police Department, from information including job descriptions and promotional examination announcements, as well as surveys of lieutenants and sergeants themselves as to what their duties are indicates that the Baltimore City Police Department operates comparably with the larger law enforcement agencies throughout our country. The management requirements of law enforcement are closely aligned with the military model. Strong discipline and supervision are required both in the military and in law enforcement, not only for the every day tasks but primarily because of the emergencies in which both the military and law enforcement may become involved. Usually, both in the military and in law enforcement the emergencies will be infrequent. However, the primary goal of both types of organizations is to be prepared for the ultimate but infrequent crisis. This is far different from the private sector which hires, trains, plans, and is organized primarily to handle the everyday tasks and not the infrequent crisis.

In addition, lieutenants and sergeants, as with all sworn personnel in law enforcement, though they are relieved from duty when they are not working their actual duty hours, still have the authority and duty through the powers given to law enforcement officers to act and react to law enforcement obligations 24 hours a day. Law enforcement officers must take action if they see violations over which they have authority, certainly within their own jurisdiction and very often state-wide. When multiple officers, even if "off duty," arrive at a law enforcement crisis scene, rank, not daily job duties, governs on scene crisis management. No matter what job duties may exist for a specific job in a law enforcement agency, there is a primary requirement that personnel be able to respond to a crisis situation by using commonly understood procedures. These are some examples of why police management is very different from management in the private sector or other governmental agencies.

Other examples of significant differences between police management and management in the private sector or other governmental agencies include the fact that sergeants and lieutenants are promoted from within the police agency through testing and performance evaluations and cannot move laterally into a supervisory position from outside the department. Advance in rank can only be achieved through participating in a testing program. Those tests are not specific, job oriented but instead stress such areas as management, supervision and administration. The tasks described are for the ranks of sergeants and lieutenants and do not relate to the daily duties required in one of the many specific jobs which could be held in those ranks. Within those ranks, sergeants and lieutenants can be transferred, as an example, from a position in the personnel division to a position in patrol without taking tests for that job change within the specific rank. Similarly the base salary is based on rank and not by specific jobs to which a sergeant or lieutenant is assigned.

9. I have been asked to consider the following words and phrases in 29 C.F.R. Part 541 and to consider, given their plain English meaning, whether they apply to police management generally and the Baltimore Police Department ranks of Sergeant and Lieutenant in particular. In my opinion, they do not. I have also been asked whether it is unreasonable to apply such terminology to Sergeants and Lieutenants. In my opinion, it is.

The inapplicable language of Part 541 includes:

EXECUTIVE EXEMPTION

§ 541.1 Executive

c) "Who has the authority to hire or fire other employees . . . "

e) . . . in the case of an employee of a retail or service establishment who does not devote as 40%" [provision] . . . . or who owns at least a 20% interest in the enterprise in which he is employed"

§ 541.5 Outside salesman

§ 541.5a Special provision for motion picture producing industry.

§ 541.99 Introductory statement

This provision refers to, among others, "any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" or "outside salesman." [an exception is provided for] "an employee of a retail or service establishment"

§ 541.102 Management

b) interviewing, selecting employees

setting and adjusting their rates of pay and hours of work

maintaining their production or sales records

controlling the flow and distribution of materials or merchandise and supplies

§ 541.103 Primary duty

"but generally spends more than 50% of time in production or sales work"

"directs the work of warehouse and delivery men, approving advertising, orders merchandise, handles customer complaints, authorizes payment of bills"

§ 541.104 Department or subdivision

d) "construction work . . . at different locations"

"he may even hire most of his work force at these locations"

e) "draws the men under his supervision from a pool"

§ 541.105 Two or more other employees

d) [example] "a large machine shop"

e) "buyer of a particular department"

§ 541.106 Authority to hire or fire

"authority to hire or fire other employees"

§ 541.108 Work directly and closely related

b) "a supervisor of production or sales records"

c) "the distribution of materials or merchandise and supplies"

"maintaining control of the flow of materials or merchandise and supplies"

"maintaining the flow of materials"

"replenishing of stock of merchandise or the sales floor"

"a large retail establishment"

d) "Set up work"

"the 'production' work"

"the employee who operates the machine also 'sets it up' or adjust it for the particular job at hand"

e) "a production operation"

"the sales floor"

"observing customer preferences and reactions to the lines, styles, types, colors, and quality of the merchandise offered" "making sales to customers, replenishing stock of merchandise on the sales floor, removing merchandising from fitting rooms and returning to stock or shelves" [the former are examples of non-management]

f) "an employee who watches machines"

"making repairs or adjustments" [other examples of non-exempt activities]

g) "set up work, machine watching and adjusting, and inspecting"

"a combination forming 'set-up' man foreman – machine adjuster or mechanic or foreman – examiner, foreman – sales person,"

§ 541.109 Emergencies

"the prevention of widespread breakdown in production, sales, or service operations"

[Illustrations]

c) "a mine superintendent"

"the manager of a cleaning establishment"

"the manager of a department in a retail store"

"the production line in a canning plant"

"the sales counter in a retail store"

d) "a breakdown of machinery"

"the collapse of a display rack"

"damage to or exceptional disarray of merchandise" "an old belt or machine which breaks down repeatedly"

"merchandise displays"

"constantly requiring resorting or straightening"

§ 541.110 Occasional Tasks

"tasks which cannot practically be performed by the production worker"

§ 541.112 Percentage Limitations on Non-Exempt Work

b)1) "a retail service establishment"

"engaged on the premises in making sales of goods or services in which the concept of retail selling or servicing applies"

"75 percent of its annual dollar volume of sales of goods or services from sales that are both not from retail and recognized as retail in the particular industry"

"stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); hospitals; or institutions primarily engaged in the care of the sick, the aged, the mentally ill, or defective residing on the premises, if open to the general public; public parking lots and parking garages; auto repair shops; gasoline service stations (but not truck stops); funeral homes; cemeteries; etc."

2) public and private elementary and secondary schools and institutions of higher education [are excepted]

3) [other exceptions] "establishment engaged in laundering, cleaning, or repairing clothing or fabrics"

c) [special exceptions for the percentage limitations]

1) relate to "sole charge" of an independent establishment, or

2) "an employee owning a 20-% interest in the enterprise"

§ 541.113 Sole-charge exception

c)1) A leased department cannot be considered to be a separate establishment . . . the retail store in which it is located operate under a common trade name and the store may determine or have the power to determine the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies, and matters such as advertising, adjustments, and credit operations, insurance and taxes, are handled on a unified basis by the store"

e) [Example] " 'desk space' in a warehouse otherwise devoted to the storage and shipment of parts is assigned a salesman who reports to the sales manager or other company official located at the home office"

§ 541.114 Exception for owners of 20-% interest

§ 541.115 Working Foremen

[distinguishing the executive from a working foreman or working supervisor] "who regularly performs 'production' work or other work which is unrelated or only remotely related to the supervisory activities"

b) "such employees, sometimes known as straw bosses, or gang or group leaders perform the same kind of work as that performed by their supporters, and also carry on supervisory functions"

"a foreman in a dress shop for example, who operates a sewing machine to produce the product"

c)1) [Example] "the foreman in a millinery or garment plant who is also the cutter or the foreman in a garment factory who operates a multiple-needle machine not requiring a full-time operator"

2) "the adjustment, repair, or maintenance of machinery or equipment. Examples in this category are the foreman – fixer in the hosiery industry . . . the planner – mill foreman who repairs the machines and grinds the knives"

3) "the foreman of the shipping room who makes out the bills of lading or other shipping records, the warehouse foreman who also acts as inventory clerk, the head shipper who also has charge of a finished good stock room, assisting and placing goods on shelves and keeping perpetual inventory records, or the office manager, head bookkeeper, or chief clerk who performs routine bookkeeping"

ADMINISTRATIVE EXEMPTIONS

§ 541.2 Administrative

a)2) "the performance of functions in the administration of school system or educational establishment or institution"

c)1) "who regularly and directly assists a proprietor, . . . "

d) "in the case of an employee of a retail or service establishment"

§ 541.201 Types of administrative employees

a)1) "modern industrial practice"

[there is a list of job titles virtually all of which are private sector titles]

2)ii) [Examples] "are credit managers, purchasing agents, buyers, safety directors,"

3)i) [Examples] "are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies"

ii) [Examples] "are special organization planners, customers' brokers and stock exchange firms, so-called account executives in advertising firms and contact or promotion men of various types"

b) "a title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status under the regulations in subpart A of this part. Titles can be had cheaply and are of no determinative value."

c) "individuals engaged in the overall academic administration of an elementary or secondary school system . . . "

§ 541.202 Categories of work

e) academic administrative personnel

§ 541.203 Non-manual work

a) " 'White-collar' includes all office workers"

"Persons employed in the routine operation of office machines are engaged in office work . . . "

b) [Manual work is inconsistent with white-collar work]

"it is obvious that employees who spend most of their time in using tools, instruments, machinery or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees"

§ 541.205 Directly related to management policies or general business operations

b) "engaged in 'servicing' a business as for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control"

c)1) [Example] "cashier of a bank"

"bank teller"

"bookkeepers, secretaries, and clerks of various kind hold the run-of-mine positions

"tax consultants"

2) "messenger boy"

"employee operating very expensive equipment"

"inspector for an insurance company"

4) "buyer of a particular article or equipment in an industrial plant or person commonly called assistant buyers in retail or service establishments"

5) "advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executive of advertising agencies, customers, brokers in stock exchange firms, promotion men . . . "

d) " . . . advisors and consultants . . . [such as] tax experts, labor relations consultants, financial consultants, systems analysts or resident buyers"

§ 541.206 Primary duty

a) academic administration or general academic operations of a school

§ 541.207 Discretion and independent judgment

c)2) an example "ordinary inspection work"

3) "examiners or graders"

4) "graders of lumbers"

"grading of commodities for which there are no recognized or established standards"

6) comparison shopping by an employee of a retail store

d)1) shipping clerk deciding method of packaging and mode of shipment of small orders

2) brokers' decision or recommendations to customer

buyers and certain wholesale salesman who have authority to negotiate on behalf of their employer

e) "assistant to the president of a large corporation may regularly reply to correspondence addressed to the president"

"a traffic manager is employed to handle the companies transportation problem."

The exempt work by such an employee "would include planning the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking city orders (for local deliveries) over the telephone. The order-taking is a routine function not directly or closely related to the exempt work and must be considered non-exempt."

§ 541.209 Percentage limitations on non-exempt work

The exemption is lost by an employee of a retail or service establishment if greater than 40 percent of his work time [non exempt]

§ 541.215 Elementary or secondary schools and other educational establishments and institutions

The fact that I have not specifically addressed other language in 29 C.F.R. Part 541 does not imply that the other language is applicable to police agencies generally, or to the sergeants and lieutenants in the Baltimore Police Department, specifically.

The crisis situations faced by law enforcement managers do not appear to have been contemplated by the language used in Part 541. The language used describes private sector management. Part 541 is unreasonable as applied to police management because it does not discuss the unique duties of a sergeant or lieutenant who are responsible for the crisis situations which come up so often in law enforcement. The Appendix to Part 541 – Occupational Index, lists more than two hundred jobs, none of which are police jobs.

10. In my experience, pay deductions were not taken if a sergeant or lieutenant missed a few hours of assigned duty. The matter would have been handled in a practical manner by the appropriate supervisor. For example, the supervisor may have the absent person work extra hours on another day.

11. Discipline is very important in the management of a police department. Generally, discipline is imposed

in degrees of severity from a reprimand to termination. An intermediate disciplinary sanction which has historically existed in virtually all police agencies is a suspension without pay for one up to any number of days. Nothing gets the attention of an officer like a potential loss of pay. The potential sanction of a suspension without pay is an important management tool for the chief executive of a police department.

12. The apparent concern for improper job titles in Section 541.201(b) has no applicability to the long-term and well understood classifications of Sergeant and Lieutenant. For example, Boston is the oldest law enforcement agency of its kind in the United States. The ranks of Sergeant and Lieutenant have existed in that Department for two hundred years. Sergeant and Lieutenant are common titles in law enforcement. The ranks of Sergeant and Lieutenant are commonly accepted titles and have generally understood duties. The tasks of various ranks in law enforcement, including those of sergeants and lieutenants, have generally been the same throughout the history of law enforcement and in the specific case of the Baltimore City Police Department can be seen by comparing the 1959 department Rules and Regulations and Manual of Procedure, which is no longer in effect, with the duties and tasks of lieutenants or sergeants as described in recent rank classification descriptions.

13. Particularly significant documentation in this case are the recent (1993 and 1994) responses to surveys of incumbent sergeants and lieutenants in the Baltimore City Police Department as to what they see as their most

important tasks. The responses of the sergeants and lieutenants, who were surveyed independently, are very similar as to the importance of tasks required of front line supervisors. These results confirm the importance of management, supervision and administration which are required in law enforcement. These important tasks mark the ranks of Sergeant and Lieutenant as unique and very different from executive and administrative managers both in the private sector and other governmental agencies. This is because those most important tasks are crisis-oriented, operating 24 hours a day, seven days a week with an extremely decentralized method of operation, requiring total cooperation and professionalism. The ranks of Sergeant and Lieutenant are critical to the police management structure.

14. Based upon my education, training, and experience, the opinions in my report, deposition, and this Declaration are based upon the reasonable certainty of one who is an expert in the field of police management.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Robert J. di Grazia
ROBERT J. di GRAZIA

2/8/95
EXECUTED ON (DATE)

Fort Myers, FL.
LOCATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*, Plaintiffs, v. BALTIMORE CITY POLICE DEPARTMENT, *et al.*, Defendants.	)	Civil Action No. B-92-1066

DECLARATION OF THOMAS C. FRAZIER

I, THOMAS C. FRAZIER, hereby depose and say:

1. I am over twenty-one years of age and make this Declaration based upon my own personal knowledge and if sworn as a witness could testify competently thereto.

2. I have been Commissioner of Police of the Baltimore Police Department (the "B.P. Department") since February 28, 1994. In that capacity, I am the chief executive of the B.P. Department responsible for the operation of the B.P. Department, including hiring, firing, promotions, discipline, organization, and all aspects of performance. I also have the authority to specify the duties and responsibilities of each rank in the B.P. Department and the duties and responsibilities of all sworn personnel employed in the B.P. Department. I hold an M.A. degree in the Administration of Criminal Justice and a B.A.

degree in Social Sciences, both from San Jose State University. Prior to becoming Commissioner, I was a member of the Police Department of San Jose, California from 1967 to 1994. I entered that Department as a police officer and held every rank, including sergeant and lieutenant, up to my final position as Deputy Chief of the Bureau of Field Operations. At that time, the San Jose Police Department had 1,350 employees.

3. During the time that I have been Commissioner of Police, I have spoken to numerous sworn members of all ranks of the B.P. Department, including union leaders of FOP Lodge #3, about personnel changes and B.P. Department reorganization. Some of these changes have been implemented and some are still under consideration. As Commissioner, I promulgate and maintain General Orders which are part of the basic policy and guidance documents of the B.P. Department. General Order 1-88 was amended on May 6, 1993 to authorize potential reimbursement of back pay to personnel exempt under the Fair Labor Standards Act, for pay deducted, if any, because of absence from duty for less than one day. No one has advised me that anyone either applied for, received, or complained about either such a prior deduction or failure to be reimbursed. To my knowledge, no one is or has been qualified for such reimbursement.

4. Personnel holding the ranks of sergeant and lieutenant in the B.P. Department are very important managers and administrators. The most important duty of personnel holding these ranks is to provide management and leadership to subordinates in times of law enforcement crises, such as a hostage situation or a robbery in progress. Personnel holding these ranks must be able to

provide such leadership twenty-four hours a day at any location within their law enforcement jurisdiction. The fact that some sergeants and lieutenants hold daily support jobs within the B.P. Department is not unimportant. But, it is within my authority to rotate all personnel among all assigned jobs when I think it is in the best interest of the B.P. Department to do so. However, those personnel were not promoted to the ranks of sergeant or lieutenant based upon their day to day jobs. They were promoted to provide management leadership in a paramilitary organization in a crisis situation which is by far their most important duty and responsibility to the B.P. Department and to me. During the time that I have been Commissioner, personnel have become sergeants and lieutenants by promotion from lower ranks by testing. We cannot bring personnel into these ranks laterally from outside the B.P. Department.

5. Discipline is critical to a paramilitary organization such as the B.P. Department. The ability to respond instantaneously and effectively to a law enforcement crisis depends upon the highest levels of morale, common training, common understanding of policies, and common attitude. Appropriate disciplinary action is essential to insuring the foregoing. Consistent with the rights and protections afforded sworn personnel, I am authorized by law to administer the full range of disciplinary sanctions for violations of B.P. Department rules and regulations. These sanctions range from an informal verbal admonishment to termination. Included within the range of sanctions are letters of reprimand, suspension with pay, reassignment, suspension without pay, and demotion. I believe that a suspension without pay is an

essential part of the sanction options. A loss of pay, even for a brief period of a few days, gets the serious attention of the person being disciplined. Termination or demotion should be reserved for the most serious offenses. A suspension with pay or lesser sanction may not discomfort the person being disciplined sufficiently to achieve the required correction. It does not matter whether or not I ever impose the sanction of suspension without pay, which I have not yet imposed, because the threat of that sanction helps maintain required discipline and attitude. In my view, the potential sanction of a suspension without pay is an essential part of the disciplinary program which is critical to the proper managing of the B.P. Department.

6. During the period that I have been Commissioner, the B.P. Department's actual manning level of sworn personnel has always been lower than the authorized manning level, sometimes by more than seventy-five people of various ranks. One of the factors in this reduced strength is the B.P. Department's annual operating budget. During the period that I have been Commissioner, direct and indirect personnel costs, primarily salaries and benefits, have been in the range of 90% of total operating budget. Therefore, the budget and potential manning levels are very sensitive to changes in available funding. Any significant increase in personnel expenses could potentially lead to further reductions in the number of sworn personnel in the B.P. Department.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Thomas C. Frazier
THOMAS C. FRAZIER

2/2/95
EXECUTED ON (DATE)

Baltimore, MD
LOCATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*,

Plaintiffs,

v.

BALTIMORE CITY POLICE DEPARTMENT, *et al.*,

Defendants.

Civil Action No. B-92-1066

DECLARATION OF EDWARD V. WOODS

I, EDWARD V. WOODS, hereby depose and say:

1. I am over twenty-one years of age and make this Declaration based upon my own personal knowledge and if sworn as a witness could testify competently thereto.

2. During the period of July 13, 1989 to November 1, 1993, when I retired, I served as Commissioner of the Baltimore Police Department (the "Department"). I joined the Department on July 2, 1959 as a Police Officer and was promoted through various ranks, including sergeant and lieutenant, until I was appointed Commissioner. In that position, I was the chief executive responsible for the performance of the Department and establishing its policies.

3. During the time that I was Commissioner of Police, I regularly spoke to numerous sworn members of all ranks of the Department, including union leaders of

FOP Lodge #3. During my service in the Department since 1985, I was never aware of any sergeant or lieutenant being docked pay for absence of duty for less than one day. During the period that I was Commissioner, I would have expected such a situation to be handled in a practical manner at the discretion of the supervisor. As Commissioner, I promulgated General Orders which were part of the basic policy and guidance documents of the Department. I issued the May 6, 1993 amendment to General Order 1-88 which authorized potential reimbursement of back pay to personnel exempt under the Fair Labor Standards Act, for pay deducted, if any, because of their absence from duty for less than one day. No one advised me that anyone either applied for, received, or complained about either such a prior deduction or failure to be reimbursed. To my knowledge, no one was qualified for such reimbursement.

4. Personnel holding the ranks of sergeant and lieutenant in the Department are very important to the management of the Department. The most important duty of personnel holding these ranks is to provide management and leadership to subordinates in times of law enforcement crises. Personnel holding these ranks must be able to provide such leadership twenty-four hours a day at any location within their law enforcement jurisdiction. The fact that some sergeants and lieutenants hold daily support or administrative duties within the Department does not detract from their most important duty. It was within my authority to rotate all personnel among all assigned jobs when I thought it was in the best interest of the Department to do so. However, those personnel were not promoted to the ranks of sergeant or lieutenant based

upon their day to day jobs. They were promoted to provide management leadership in a paramilitary organization in a crisis situation which was by far their most important duty and responsibility; and, I intended that promotional exams for those ranks reflected the importance of that type of management and leadership rather than whatever duties their day to day jobs might include. During the period that I was Commissioner, personnel became sergeants and lieutenants by promotion from lower ranks by testing. We could not bring personnel into these ranks laterally from outside the Department.

5. Discipline is critical to a paramilitary organization such as the Department. The ability to respond instantaneously and effectively to a law enforcement crisis depends upon the highest levels of morale, common training, common understanding of policies, and common attitude. Appropriate disciplinary action is essential to insuring the foregoing. Consistent with the rights and protections afforded sworn personnel, I was authorized by law to administer the full range of disciplinary sanctions for violations of Department rules and regulations. These sanctions ranged from an informal verbal admonishment to termination. Included within the range of sanctions were letters of reprimand, suspension with pay, suspension without pay, and demotion. Although I did not impose the sanction of suspension without pay, I believe that a suspension without pay is an essential part of the sanction options for the Police Commissioner. The threat of a loss of pay, even for a brief period of a few days, got the serious attention of sworn personnel subject to being disciplined. Termination or demotion should be reserved for the most serious

offenses. A suspension with pay or lesser sanction may not adequately discomfort a person being disciplined sufficiently to achieve the required correction. It does not matter that I never imposed the sanction or suspension without pay, because the threat of that sanction helped maintain required discipline and attitude. In my view, the potential sanction of a suspension without pay is an essential part of the disciplinary program which is critical to the proper managing of the Department.

6. During the period that I was Commissioner, the Department's actual manning level of sworn personnel was always lower than the authorized manning level, sometimes by more than seventy-five people of various ranks. One of the factors in this reduced strength was the Department's annual operating budget. During the period that I was Commissioner, direct and indirect personnel costs, primarily salaries and benefits, were in the range of 90% of total operating budget. Therefore, the budget and potential manning levels were very sensitive to changes in available funding. Any significant increase in personnel expenses could have potentially led to further reductions in the number of sworn personnel in the Department.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Edward V. Woods
EDWARD V. WOODS

1/27/95
EXECUTED ON (DATE)

3601 Clarks Lane
LOCATION

(2)

Supreme Court, U.S.
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No. 98-1802

In The
Supreme Court of the United States

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BALTIMORE CITY POLICE DEPARTMENT, et al.,
Petitioners,
v.

FRATERNAL ORDER OF POLICE, LODGE 3, et al.,
Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

RESPONDENTS' BRIEF IN OPPOSITION

◆

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ARGUMENT

1. The Instant Case Is Unlike the One Contemplated in *Auer,* and No Inter-circuit Conflict Exists with Respect to *Auer*'s Meaning.

The language in *Auer* cited by the Department in its Petition for Certiorari at page 12 does not "invite" a case like the one presented here, primarily because the issues the Department raises are those which have been addressed by this Court in other cases involving the FLSA in general, the salary basis test of Part 541 in particular, and their application to local law enforcement officers. *See Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) (involving application of FLSA to public employers); *Auer v. Robbins,* 519 U.S. 452 (1997) (involving application of the salary basis test to police officers). In addition, the Petitioners' *Auer* reference regarding challenges to rulemaking does not address the specific subject matter of the FLSA, the salary basis test, and law enforcement officers. It merely illustrates the distinction between a challenge to an agency's failure to amend a regulation and a challenge to an agency's regulation based on its interpretation of the enabling statute or based on flaws in procedural requirements under the APA.[1] If this Court wanted to express a desire to hear a case specifically addressing the disciplinary-deduction rule of Part 541 as applied to state and local governments, it presumably would have used "the Department of Labor's regulation" instead of "an agency." To say that this Court "invited this case as a vehicle to address defects in the application of Part 541 to State and local government employers," Pet. for Cert. at 12, is to grossly overstate the ordinary understanding of the Court's language.

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[1] Interestingly, the standard of review is different for the two types of challenges which the *Auer* Court recognized as entitled to judicial review without initial recourse to the agency directly. *See Boyd v. Glickman,* 12 F. Supp. 2d 1261, 1266 (M.D. Ala. 1998). In that case, the District Court distinguished the two, noting that the standard of review for interpretative challenges was governed by *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) and the procedural challenge was governed by the APA §§ 701-706.

Even if the Court did in fact invite this particular type of case with the quoted language from *Auer*, the case at issue here is not a candidate for Supreme Court review because the issue raised by the Department in its Petition for Certiorari mirrors that raised in the Fourth Circuit – the applicability of the salary basis test of Part 541 to local law enforcement. The salary basis test is no longer at issue in this case. Respondent Sergeants and Lieutenants have repeatedly argued in favor of application of the "primary duty" test of Part 541, which the Department fails to address anywhere in its Petition. The salary basis test has been abandoned as an issue in this case; therefore, there is no need for the Court to hear this case.

For much the same reason as noted above, any "[p]ost-*Auer* confusion" among the lower courts, if any truly exists, is largely irrelevant here. Several cases to which the Petitioner cite as approving of or ignoring the *Auer* language and which involve the application of the FLSA to the public sector again address only the salary basis test. *See Balgowin v. New Jersey*, 115 F.3d 478 (D.C. Cir. 1997); *Bowman v. City of Indianapolis*, 133 F.3d 513 (7th Cir. 1998); *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997); *Adams v. United States*, 40 Fed. Cl. 303

(Fed. Cl. 1998). Two cases even make a point to say that the primary duty test is not an issue at all. *See Arrington*, 973 F. Supp. at 1469; *Bowman*, 133 F.3d at 515-16. Because *Garcia* foreclosed the relitigation of the propriety of applying the FLSA overtime provisions to public employees absent a failure of the national political process, the only proper issue in this case was resolved by the Fourth Circuit consistent with prior Supreme Court decisions.

The Police Department's discussion on page 14 of its Petition, citing cases in which challenges to regulations were permitted, is incomplete. *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C.Cir. 1998), did not challenge rulemaking procedures, but addressed agency interpretation, invoking analysis under *Chevron*. The same was true of *Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302 (5th Cir. 1998) and *Adams v. U.S.*, 40 Fed. Cl. 303 (Fed. Cl. 1998). To the extent *Adams* did address the propriety of rulemaking, it followed *Auer*. *Adams*, 40 Fed.Cl. At 306. *Cassell v. FTC*, 154 F.3d 478 (D.C.Cir. 1998), specifically declined to address a rulemaking challenge under the exhaustion doctrine. *Id.* at 485.

The same is true of the asserted conflict appearing in part 3.e. of the Petition, page 22. Those cases did not address rulemaking or notice and comment challenges. Rather, they addressed agency interpretation utilizing an arbitrary and capricious standard.

2. The "Comprehensive Record" in this Case Refers in Large Part to the Salary Basis Test Portion of Part 541, Which Was Not at Issue on Appeal in the Fourth Circuit. The Fourth Circuit Acted Properly Because it Recognized That a Balancing Test Was Inapplicable to the Circumstances of this Case.

As noted above, the issue involving the disciplinary-deduction portion of the salary basis test was disposed of in the lower court. However, the record to which the Department refers has been developed almost exclusively on the basis of the numerous challenges to the salary basis portion of Part 541. In fact, the primary duty test is not mentioned at all in the Department's Petition.

A substantial portion of the Petitioner's argument revolves around the standard for limiting congressional power under the Commerce Clause developed in *Garcia*. There, this Court determined that the test from *National League of Cities v. Usery*, 426 U.S. 833 (1976), i.e., that Congress' commerce power did not extend to regulations which affected the states in "areas of traditional governmental function," was impractical and difficult to apply. *Garcia*, 469 U.S. at 537-48 (quoting *Usery*, 426 U.S. at 845, 852, 854). When *Garcia* was decided, this Court established a new test – that the commerce power extended to regulation of state activities as long as the states had a meaningful opportunity to be involved in the national political process. *Garcia*, 469 U.S. at 554-56. As long as the political process functions normally – as the Framers envisioned – the reasoning goes, rules that are "unduly burdensome" to the States will not be promulgated. *Id*. at 554, 556.

However, it is difficult to see how the Department comes to the conclusion that the Court has molded the *Garcia* standard into a balancing test through its decisions in *Printz v. United States,* ___ U.S. ___, 117 S. Ct. 2365 (1997) and *New York v. United States,* 505 U.S. 152 (1992). Both cases invalidated attempts by Congress to regulate the states through legislation requiring states or localities to expend resources and essentially become the vehicle to implement the congressional mandate.[2] Neither case made any reference to balancing tests; each legislative scheme was rejected based on rather transparent attempts by Congress to force states to implement unpopular government policies. In *Printz,* this Court chose to focus on three areas: 1) the historical background of congressional attempts to impose obligations on the executive and judicial branches; 2) the structure of the Constitution itself – namely, the conscious decision of the Framers to create a system that would govern *the people,* not the states and to establish a federal system; and 3) the Court's previous decisions, including *New York*. *Printz,* 117 S. Ct. at 2369. In *New York,* this Court made it clear that, even if the Commerce Clause gave Congress the power to legislate the performance or prohibition of certain acts, it did not give Congress the ability to directly force the states to perform or prohibit those activities. *New York,* 505 U.S. at 161 (citing *FERC v. Mississippi,* 456 U.S. 472, 762-66 (1982). Neither case addresses a regulation promulgated under a constitutional federal statute; neither attempts to weigh the interests of the states against the interests of the federal government. In fact, the *New York* Court made it clear that no Justice had "ever suggested that [a particularly strong] federal interest would enable Congress to command a state government to enact *state* legislation." 505 U.S. at 178. *Printz* and *New York* instead look to basic concepts of federalism, as it has been understood from the founding of this nation, to determine whether Congress has crossed the line.

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[2] *In Printz,* the challenge was to a temporary provision of the Brady Handgun Violence Prevention Act, Pub.L. 103-159, 107 Stat. 1536, which required local law enforcement agencies to perform background checks on applicants who wanted to purchase handguns until the national system mandated by the statute was in place. 117 S. Ct. at 2368. *New York* involved a provision of the Low-level Radioactive Waste Policy Act that required states who did not comply with one of several "options" given them by the statute to "take title" to all the low-level radioactive waste that state produced, as well as to accept all liability for any direct or indirect damages incurred by the owners for failing to take title promptly. 505 U.S. at 153-54. The effect would be for the state to pay to dispose of waste produced by all private entities within that state's boundaries. *Id.* at 174-77.

While it is true that the *Garcia* Court did not specify what such a "failure in the national political process" would be in practical terms, the record in this case shows that the Petitioners have been unsuccessful in their attempt to demonstrate how the application of the FLSA to state and local law enforcement officers is evidence of a major threat to our system of constitutional federalism. Furthermore, the fact that no legislation has been invalidated using a *Garcia* balancing test does not mean there has been a misperception of *Garcia* by lower courts, as suggested by the Police Department at pages 16-17 of their Petition. It is far more likely evidence that our national political process, which has worked for over 200 years, continues to do so.

3. No Basis Exists for Challenging the Application of the FLSA's Primary Duty Test to State and Local Police Officers

a. While the Costs to State and Local Governments Imposed by Application of the Fair Labor Standards Act to Municipal Police Departments May Be Significant, Those Same Costs Are Offset by the Amount of Money States and Localities Receive from the Federal Government Each Year.

It is significant that the regulations at issue here, those which apply the FLSA to public employers including local law enforcement, do not have the same fatal flaw that the attempted regulations in *Printz* and *New York* had. The laws challenged in those cases mandated States and localities to act in certain ways directly, by forcing them to expend their own resources to implement Congress' wishes. In contrast, the instant case involves applying long-existing Department of Labor regulations to public sector employers. The Supreme Court has already passed on the propriety of such application in numerous cases, including *Garcia* and *Auer.* As a result, the Police Department attempts to show what it believes are the enormous costs associated with compliance and litigation. However, it is important to remember that the same entities who now must comply with regulations under the FLSA receive a sizeable amount of federal money each year, even if not linked directly to the FLSA. The FLSA is not the only federal legislation that requires the states to make financial expenditures in order to comply with a congressional mandate and which has been upheld as a valid exercise of the commerce power.

See e.g., the Clean Air Act, 42 U.S.C. § 7401, the Fair Housing Act, 42 U.S.C. § 3601, environmental policy legislation, 42 U.S.C. § 4321, the Age Discrimination in Employment Act, 42 U.S.C. § 6101, the Americans with Disabilities Act, 42 U.S.C. § 12101, pollution control legislation, 42 U.S.C. § 13101 and the Veteran's Re-employment Rights Act, 38 U.S.C. § 2021. In the face of the cumulative effect of such impositions, the Police Department has offered no empirical evidence of state and local governments being crippled.

In addition, it is necessary to keep the figures cited by the Petitioners in perspective. They rely on figures provided by the Advisory Commission on Intergovernmental Relations ("ACIR") but do not specify what types of costs were included in those figures. Pet. for Cert. at 18. Another issue that the statistics do not address is whether the costs associated with implementing the regulations would remain static every year. It is entirely possible that the initial costs would be high as a result of creating mechanisms for determining exempt status and adjusting work schedules to try to avoid paying overtime to non-exempt employees, but costs in later years could dissipate. The potential litigation costs the Petitioners address may be a factor precisely because of cases such as this one, where state or local governments attempt to relitigate issues that are not at issue on appeal.

b. Notice and Comment under the Administrative Procedure Act Has Been Satisfied as to the Primary Duty Test, the Only Portion of Part 541 at Issue on Appeal in this Case.

The Police Department's entire discussion of the allegedly improper procedure used by the Department of Labor when it applied Part 541 to state and local entities centers around the salary basis test, which was not at issue on appeal in this case. The Police Department has not attempted to mount any sort of challenge to the primary duty test portion of Part 541, even though that portion of the regulation was adopted for application to the public sector along with the salary basis test in Part 553. Presumably, then, the Department would have every reason to challenge its notice of that portion of the exemption test as well. Yet in its Petition, the Department consistently refers only to the DOL's failure to complete its informal rulemaking process of revising Part 541 with respect to the salary basis test. In fact, most of the cases cited by the Department do not even address the primary duty test; those that do mention it only do so to say that it has been satisfied. *See Arrington*, 973 F. Supp. at 1469; *Bowman*, 133 F.3d at 515-16. Even more importantly, this case is indistinguishable from the facts of *Auer*, as the Fourth Circuit noted:

> it is clear that the City's challenge, although phrased in terms of notice and comment, is really an attack on DOL's failure to revisit rulemaking in the wake of *Garcia*. Therefore, because the record does not reveal that the City has petitioned DOL to undertake amendatory rulemaking, we conclude that the City's challenge is premature.

Pet. for Cert., App. 5a. Also of importance is the fact that notice and comment rulemaking existed in reference to the original 1974 amendments extending the FLSA to state and local governments. The Baltimore Police Department was in existence at the time of these amendments, and the 1974 provisions, at least as to the EAP exemptions, virtually mirror the post-*Garcia* exceptions.

Additionally, the notice and comment in reference to 29 C.F.R. 553, which also applies to police, not only mirrors § 541 exemptions, but specifically incorporates § 541 by reference:

> (a) There are other exemptions from the minimum wage and/or overtime requirements of the FLSA which may apply to certain public agencies. The following sections provide a discussion of some of the major exemptions which may be applicable. This list is not comprehensive.
>
> * * *
>
> Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements from any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary.

29 C.F.R. § 553.32. 51 Fed. Reg. 13,410 incorporated the Part 541 reference regarding the notice of the EAP exemptions:

> § 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime requirements for any employee employed in a bona

> fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all the pertinent tests relating to duties, responsibilities, and salary.

Finally, the so-called "futility" in *Auer's* requirement of first petitioning the Department of Labor, as suggested by the Police Department at page 22 of its petition, would apply, if at all, to salary basis regulations. As discussed *supra,* that is no longer a basis for the Sergeants' and Lieutenants' claims. The Police Department has continually hinged its arguments on salary basis issues, and continues to doggedly attack provisions not part of the Respondents' analysis. Indeed, the *Amicus* petition is nothing but a salary basis attack, underscoring the inapposite nature of the Petitioners' analysis.

c. It Is Not "Arbitrary" and "Capricious" to Apply the Primary Duty Test Found in Part 541 to Police Officers, Nor Is it Contrary to Congressional Intent.

As noted above, the Department has voiced no opposition to the primary duty test of Part 541 during the entire thirteen years that the notice and comment period for the revised Part 541 has been ongoing. Even if they were to challenge the test under the "arbitrary" and "capricious" standard of *Chevron,* that case makes it clear that a court should give great deference to an agency's interpretation of congressional direction as provided by the legislation. 457 U.S. at 842-46. The *Chevron* analysis requires first that the reviewing court look to the statutory language to see if Congress has provided a clear mandate. *Id.* at 842-43. If so, the court looks to the agency's interpretation of that language to see if it is in accord with the mandate. *Id.* If the language is ambiguous, the court must then defer to the agency's expertise in the area as long as "the agency's answer is based on a permissible construction of the statute." *Id.* at 844. No such test was performed by the Court in *Auer,* so the Department's lengthy discussion of the salary basis test and the relationship of *Auer*'s language precluding review of certain administrative law issues is largely irrelevant and serves merely to bootstrap the Department's contention that *Auer* does not foreclose review of this case.

As to congressional intent, there is little evidence to show that Congress is opposed to the application of DOL's regulations to public employees. *Garcia* was decided in 1985; to date, Congress has taken no action to illustrate a desire to prevent local law enforcement from coming under the umbrella of the FLSA. Subsequent cases specifically addressing the relationship between the FLSA and local law enforcement, cited at length by the Petitioners, have likewise failed to spur congressional action to reverse the direction taken by the DOL.

d. There Has Been No Failure in the National Political Process, Contemplated in *Garcia,* That Has Imposed Undue Burdens on States by the Application of the Fair Labor Standards Act to Police Officers.

The Police Department's expert witnesses testified as to their own perceptions of the direction our government has taken, based on their experience in politics and scholarship. However, neither the experts themselves nor the Department in its Petition was able to show with particularity how the experts' ruminations about state and local governments' inability to participate in the political process was borne out in the instant case. The Petitioners have failed to show any sort of nexus between the application of Part 541 to state and local entities and the testimony of the experts as to the failure of the national political process. Nowhere did they suggest that states and municipalities were unable to provide meaningful input into the process of implementing the FLSA. In fact, states and municipalities are free to petition the DOL for a revision of the current standards; they were also able to participate in the initial notice and comment rulemaking under which the current rules are promulgated. If they then feel that their concerns are not being addressed, they have recourse to forming coalitions and lobbying Congress for a change in the law, or even to influence future congressional elections.[3] But it is disingenuous to argue that the national political process has failed just because the complaining states' wishes were not granted with respect to FLSA exemptions. The argument is similar to an appellate advocate who, having presented his argument to the Court, complains of a failure of the judicial process because the Court did not rule in his favor.

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[3] A good example of such organization is the numerous groups who have filed as *amici curiae* with this Court as well as with the Fourth Circuit.

In fact, evidence of state and local ability to influence legislation exists empirically in 29 U.S.C. § 207(k), providing for more flexible computation of overtime payment periods for, *inter alia*, police, and 29 U.S.C. § 207(o), allowing crediting public employees with compensatory time. How such clear concessions to state and local governments could exist given the utter failure of the national political process suggested by the Petitioners remains unexplained.

e. The Application of the FLSA and Related Regulations to Police Officers Is Constitutional.

1) Extension of the FLSA to State and Local Law Enforcement Was a Valid Exercise of Delegated Congressional Commerce Power, Especially in Light of this Court's Holding in *Garcia*.

The interstate nexus required by the Commerce Clause is met by application of the regulations promulgated under the FLSA to police officers because the nature of police work can and does have a "substantial effect on interstate commerce," the standard established in *United States v. Darby*, 312 U.S. 100, 119-20 (1941). In the case at bar, the Sergeants and Lieutenants presented evidence showing that Baltimore City Police respond to calls on Interstates 83 and 95, two major thoroughfares for interstate travel to the Port of Baltimore. Among other things, it provides protection to businesses and manufacturers that engage in interstate commerce, some of its officers conduct out-of-state investigations and assist federal authorities in investigations, it investigates crimes that cross state lines, and is required to go out of state to apprehend fugitives. As a result of such connections, police work in Baltimore City cannot truly be characterized as a purely intrastate activity. Even if the work could be considered purely intrastate, that activity does have a substantial effect on interstate commerce, because absent the Baltimore City Police's presence and their efforts to apprehend criminals and protect people and businesses, interstate commerce passing through the state of Maryland would be severely reduced. Such a situation is analogous to that involved in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). There this Court held that motel owners could not engage in racial discrimination to prevent black people from patronizing their establishment because, although motel business was a purely intrastate activity, it nonetheless substantially affected interstate commerce. *Id.* at 255-258.

2) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Necessary and Proper Clause

The Petitioners are misguided in believing that *Printz* governs their contention that the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, precludes the application of the FLSA to this case. *Printz* involved a direct congressional mandate to states and localities that the

Court found was impermissible under the Constitution. 117 S. Ct. at 2384. It specifically noted that no provision of the Constitution governed such an action, so this Court resorted to a review of history, the structure of the Constitution, and the Court's prior jurisprudence to arrive at a decision. *Id.* at 2369. What is more germane to the necessary and proper issue is the reading of "necessary and proper" by Alexander Hamilton in the Federalist No. 22: "necessary often means no more than needful, requisite, incidental, useful, or conductive to," The Federalist No. 22, at 97, which has been consistently upheld by this Court. *See e.g., McCullough v. Maryland,* 4 Wheat 316, 4 L.Ed. 579 (1819). This broader interpretation conforms to a more reasonable understanding of the federal government's role that limits Congress' power while simultaneously giving Congress the tools it needs to function in its role as a dual sovereign.

3) Extension of the FLSA to State and Local Law Enforcement is not foreclosed by the Guarantee Clause

The Sergeants and Lieutenants do not argue with the assertion that the guarantee clause operates to protect "dual sovereignty," *New York,* 505 U.S. at 184-86; *Printz,* 117 S. Ct. at 2376-77. What they do disagree with, however, is the contention that national regulation of the wages of local police officers somehow prohibits the federal government from guaranteeing the states a republican form of government. While it is true that police officers enforce state law, it is also true that those officers to whom the regulation at issue would apply are not the individuals with the discretion to determine "what conduct constitutes a crime and when to effect an arrest." (p. 28, *quoting* Deborah Jones Merritt, *The Guarantee Clause and State Authority: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 57 (1988)). For the most part, the officers who potentially are affected by the overtime regulations of the FLSA are individuals who follow policies set by the Commissioner and his advisors. Their discretion is necessarily limited by their position at the lower end of the hierarchy and the need to have a set of uniform rules to ensure that all people are treated fairly. The fact that the Commissioner is the ultimate arbiter of policy belies the Petitioners' argument; the Commissioner is appointed by the Mayor and is ultimately responsible to the Mayor and the citizens who elected him. Finally, *Garcia* mandates that the FLSA regulations apply to all public employees; the Police Department's implication that police officers are in the same category as governors, legislators, and judges[4] is inexplicable.

4) The Court's Recent Decisions Are Consistent with *Garcia*, and There Is No Real Evidence to Suggest That the States Are Not Adequately Protected by the Structure of the Federal Government, as *Garcia* Emphasized.

New York and *Printz* should not be read to alter the way the Court views federalism, because, while neither explicitly relied on *Garcia*'s "failure of the political process" standard, both involved situations in which this Court did not need to articulate that standard. Both cases involved congressional attempts to directly regulate states and localities which, this Court noted in *Printz*, is not directly addressed in the Constitution. 117 S. Ct. at 2369. The two cases are inapposite to the situation presented by this case which, contrary to the Petitioners' assertions, is controlled by *Garcia* because police officers are public employees and the DOL's regulations were promulgated under properly delegated commerce power. Although a different type of employee was involved in *Garcia*, the fact that both cases involved overtime regulations under the FLSA suggests more of a connection than *Printz* and *New York*, which involved federal legislation forcing states to act in certain ways. Finally, the Petitioners are in error when they assert that a *Garcia* analysis would invalidate application of the FLSA in this case. Pet. for Cert. at 30. They neglect to explain what they mean when they say that the states were "politically isolated . . . at the time of the 1974 Amendments to the FLSA," and that Congress "stripped" the states of their "natural allies." *Id*. The argument is ultimately revealed to be circular; because the FLSA was applied to the States, this necessarily means that States were politically isolated, unable to act.

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[4] These categories of public employees are exempt from the FLSA by the statute itself.

Even assuming that the Police Department correctly interprets the Court as endorsing the belief that the members of Congress of a State do not represent the citizens of that state, it is important to remember that it is the citizens of that State who elect those same congressional members. The Police Department's citation to *U.S. Term*

Limits v. Thornton, 514 U.S. 779, 803 (1995), omits the context of the discussion, which involved the inability of states to prescribe qualifications for congressional members. To draw from that discussion a conclusion that these elected officials no longer respond to concerns of their respective home states is unwarranted.

◆

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 207(k):

> Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(o):

Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

51 Fed. Reg. 13,410:

§ 13 (a)(1) of the Act provides an exemption from both the minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all the pertinent tests relating to duties, responsibilities, and salary.

③

Supreme Court, U.S.
F I L E D
JUN 2 1999
CLERK

No. 98-1802

In The
SUPREME COURT OF THE UNITED STATES

BALTIMORE CITY POLICE DEPARTMENT, *et al.*,

Petitioners,

- against -

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND OTHER NAMED STATES, COUNTIES, CITIES AND ORGANIZATIONS ON BEHALF OF PETITIONERS

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June 1, 1999

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INTERESTS OF AMICI CURIAE[1]

City of New York

The City of New York and related entities ("City") have over 8,000 managerial employees, and thousands more supervisory employees, whom the City has always considered within the exemption in the Fair Labor Standards Act ("FLSA") for persons "employed in a *bona fide* executive, administrative or professional capacity". *See* 29 USC § 213(a)(1). Approximately 5,000 of these employees have sued the City for back overtime and liquidated damages in six lawsuits on the theory that, under Department of Labor ("DOL") regulations, they are actually hourly employees. *See* 29 CFR Part 541.

One of those cases went to a judgment that was adverse to the City on the principal legal issues, and the United States Court of Appeals for the Second Circuit affirmed. *Yourman v. Dinkins*, 826 F Supp 736 (SDNY, 1993), *aff'd*, 84 F3d 655 (2d Cir., 1996). This Court granted the City's petition for a writ of certiorari and remanded the case to the Court of Appeals for reconsideration in light of this Court's ruling in *Auer v. Robbins*, 519 US 452 (1997). *Giuliani v. Yourman*, 519 US 1145 (1997). The Court of Appeals remanded the case to the District Court, the parties made additional submissions, and the parties now await a ruling by the District Court on the parties' renewed cross-motions for summary judgment.

The previous judgment in *Yourman* was close to $14 million for back overtime, liquidated damages and attorneys' fees. In a second case, although judgment has not yet been entered, back overtime and liquidated damages have been calculated to be over $6 million. *Feaser v. City of New York*, 93 Civ. 5739 (SDNY, 1997). A very rough estimate is that the City's exposure in the four other lawsuits may be as much as $30 million.

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[1] Counsel for a party did not author this brief in whole or part. No person or entity other than the *amicus curiae*, its members, or counsel have made any monetary contribution to the preparation or submission of the brief.

The DOL regulations, as applied in *Yourman*, leave the City between the Scylla and Charybdis of either making virtually all of its previously-exempt employees hourly employees, or of revising its policies to mirror the "salary basis test" for determining whether an employee is within the exemption for managerial employees. *See* 29 CFR § 541.118. Making all of its managers hourly employees would be costly; the City estimated, in the record in *Yourman*, that if it were to make all of its managers hourly employees, and if each manager were to work two hours of overtime each week, then the annual cost to the City would be $60 million.

The alternative of revising policies to satisfy the salary basis test is no better. The City revised its policies after the District Court ruled on liability in *Yourman* in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted. *See* 29 CFR § 541.118(a)(4). This obviously creates the potential for abuse by unscrupulous employees and at least arguably would cause a public employer to violate the public accountability principle.[2]

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[2] The public accountability principle is that public employees must account for all hours for which they are paid and that public employees must not be paid for time spent not working. *See generally Service Employees International Union v. County of San Diego*, 60 F3d 1346, 1352 & n.2 (9th Cir., 1995), *cert. denied*, 516 US 519 (1996); *Mueller v. Reich*, 54 F3d 438, 442 (7th Cir.), *vacated and remanded*, 519 US 1144 (1997), *complaint dismissed*, 133 F3d 1063 (7th Cir., 1998); *Hilbert v. District of Columbia*, 23 F3d 429, 435 (DC Cir., 1994) (Henderson, J, (continued...)

The revised policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed. *See* 29 CFR § 541.118(a)(5) (permitting penalties only for violations of safety rules of major significance). Termination and demotion, the only remaining meaningful penalties, are very serious penalties, and the City is loath to impose them unless it believes that the infraction is equally serious and that the courts will not overturn them under the progressive discipline principle.[3]

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[2] (...continued)
concurring in part and dissenting in part); 57 Fed. Reg. 37,666 (1992). In New York, article VIII, section 1 of the state constitution prohibits the gift of public funds and is understood to mean that public employees may not be paid for time not spent working. *Boyd v. Collins*, 11 NY2d 228, 234, 228 NYS2d 228, 182 NE2d 610 (1962), *overruled, in part, on other grounds*, 46 NY2d 450, 414 NYS2d 109, 386 NE2d 1077 (1979), *rehearing denied*, 46 NY2d 1076 (1979); *see also Brooklyn Society for Prevention of Cruelty to Children, Inc. v. Blum*, 56 NY2d 909, 912, 453 NYS2d 408, 438 NE2d 1123 (1982); *Mullane v. McKenzie*, 269 NY 369, 377, 199 NE 624 (1936), *rehearing denied*, 270 NY 563, 200 NE 319 (1936). Nothing in the record or plaintiffs' papers in *Yourman*, nor any judicial decision of which we are aware, names a single state or local government entity that does not operate under the public accountability principle.

[3] The progressive discipline principle, which applies to public sector employers, is that the punishment must not be disproportionate to the offense in light of the employee's disciplinary record. This principle is followed in New York. *See Pell v. Board of Education*, 34 NY2d 222, 234-35, 356 NYS2d 833, 313 NE2d 321 (1974); *McAvoy v. Ward*, 145 AD2d 378, 381, 535 NYS2d 721, 723-24 (1st Dept., 1988), *leave to appeal denied*, 74 NY2d 606, 544 NYS2d 820, 543 NE2d 85 (1989); *Hutchinson v. Lloyd*, 216 AD2d 3, 627 NYS2d 46 (1st Dept.), *leave to appeal denied*, 86 NY2d 710, 635 NYS2d 947, 659 NE2d 770 (1995).

OTHER AMICI

The other *amici* consist of various states, counties, cities and organizations[4] that work with such governmental entities. As set forth below, their statements illustrate some of the extraordinary financial costs and administrative difficulties already incurred as a result of requiring governmental entities to comply with the FLSA and its implementing regulations.

STATES

State of Alabama

The State of Alabama joins as an *amicus* on behalf of petitioners. Alabama is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Colorado

The State of Colorado joins as *amicus* on behalf of petitioners. Colorado is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations. For example, to date, approximately 200 plaintiffs have sued Colorado in five separate actions involving the FLSA. So far, the State has paid out approximately $130,000 in overtime compensation on FLSA claims. Colorado estimates its future exposure for such claims to be in the range of $4 million.

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[4] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

State of Iowa

The State of Iowa joins as an *amicus* on behalf of petitioners. Iowa is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Nevada

The District Court's award of summary judgment to the plaintiffs on their 29 CFR Part 541 overtime claims, in *Benzler v. State of Nevada*, CV 9162-ECR (DC Nev., 1992), affected many thousands of other state employees as well, directly resulting in payouts by Nevada of more than $6 million in overtime compensation. Since *Benzler*, another four suits brought under the FLSA in federal court, involving 97 plaintiffs, have cost the State an additional $310,000.

State of South Dakota

The State of South Dakota joins as an *amicus* on behalf of the petitioners. South Dakota is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Utah

The State of Utah joins as an *amicus* on behalf of petitioners. Utah is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

COUNTIES

Anne Arundel County, Maryland

Anne Arundel County has paid out $2,865,436.87 in a FLSA case for overtime pay brought by firefighters of the Anne Arundel County Fire Department. *See West v. Anne Arundel County, Maryland*, 137 F3d 752 (4th Cir.), *cert. denied*, 119 S Ct 607 (1998). Furthermore, Anne Arundel County is defending another FLSA suit in *Praschak v. Anne Arundel County, Maryland*, No. B-97-3701 (D. Md.).

Prince George's County, Maryland

Prince George's County of Maryland joins as an *amicus* on behalf of petitioners. Prince George's County is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

CITIES

City of Los Angeles, California

Since 1985, the City of Los Angeles has defended, or is defending, eight cases involving some 1500 employees, all of which involve some aspect of the salary basis test at issue in *Baltimore City Police Department v. Fraternal Order of Police, Lodge 3, et al.*,. The City's potential liability for these eight cases exceeds $13 million. For example, the City has settled the following cases: *Weber v. City of Los Angeles*, CV 91-1234, a case involving 184 employees, settled for $2 million; *Rusk v. Department of Water & Power*, CV 92-7316, a case involving 135 employees, settled for $7 million. Similarly, the City has sustained judgments and is appealing, or planning to appeal, the following cases: *Higuera v. City of Los Angeles*, CV 93-2527, a case involving 285 employees, adverse judgment in the amount of approximately $1 million; and *Block v. City of Los Angeles*, CV 91-5461, adverse judgment in the amount of approximately $1 million. Moreover, plaintiffs have appealed a District Court judgment rendered in *Morsch v. City of Los Angeles*, CV 91-0401, a case involving approximately 98 employees, where approximately $5 million is at issue.

City of Phoenix, Arizona

Since 1985, the City of Phoenix has paid out approximately $4.2 million to settle FLSA litigation, including $3.65 million in a class action suit brought on behalf of 2500 police officers with overtime claims, *Petrocino v. City of Phoenix*, No. C-545439 (Maricopa Co. Superior Ct., 1986); and over $338,000 in a suit for overtime pay brought by police sergeants and lieutenants pursuant to 29 CFR Part 541, *Sullivan, et al. v. City of Phoenix*, CIV 91-0557, 91-0647, 92-0213 (DC Ariz., 1991-92). The City is currently being sued by two attorneys who provide legal advice to its police department, with the plaintiffs seeking approximately $160,000 in overtime for hours worked above forty hours per week. *Kavanaugh v. City of Phoenix*, CIV 98-0377 (DC Ariz., 1998), and *Edwards v. City of Phoenix*, CIV 98-0378 (DC Ariz., 1998).

Salt Lake City, Utah

Salt Lake City is the capital of Utah and it is the State's largest city. It is a quality employer and uses its best efforts to comply with all state and federal law. The City has a sophisticated, unionized, well-paid workforce with whom it enters into collective bargaining agreements. The City has been the target of numerous DOL audits for FLSA compliance, including several of its police department. Responding has been burdensome and has diverted significant economic and human resources away from providing public services. The City is presently appealing a $53,000 civil penalty wrongfully assessed by DOL which, if unchallenged, would remove funding of one police officer for an entire year.

The City and County of San Francisco, California

"*Amici* City and County of San Francisco" ("San Francisco") have at least 5305 managerial and supervisory employees considered within the executive, administrative and professional exemption from FLSA overtime requirements. *See* 29 USC § 213(a)(1). San Francisco maintains collective bargaining agreements with employee organizations, as well as work rules, that apply to these employees and may, while pursuing proper and fair objectives, run afoul of DOL limitations on the exemption. San Francisco also employs 610 police personnel and 1254 fire and paramedic personnel who are partially exempt under the FLSA. *See* 29 USC § § 207(k). DOL limitations, however, create the possibility of substantial litigation and the threat of substantial judgments over the details of the exemption. Indeed, several partially exempt employees recently filed suit against San Francisco. *See Rooker v. City and County of San Francisco*, 99-1095-VRW (ND, Ca., Complaint filed March 9, 1999). The validity of the DOL regulations will be a central issue of the litigation.

City of Warner Robins, Georgia

In December 1996, the City of Warner Robbins settled a FLSA case brought by a group of police officers in the amount of $432,500. As a result, the budget for the City's current fiscal year allocates an additional $515,139 for overtime and on-call pay above the $11,833,452 funded for general salaries.

ORGANIZATIONS

International Municipal Lawyers Association

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization that has provided services and programs to local government lawyers since 1935. With a membership of more than 1500, IMLA is the oldest and largest association of attorneys that represent local governments.

Since its establishment, IMLA has served its membership by being an advocate for the interests, positions and views of local governments involved in cases pending in the United States Supreme Court, in federal circuit courts, and in state appellate and supreme courts that present legal issues, such as those involved here, that may have a significant impact on a substantial number of governments across the United States.

International Personnel Management Association

The International Personnel Management Association ("IPMA") represents over 1700 member agencies including civil service commissions, merit system boards, and personnel departments at the federal, state and local levels of government and more than 4200 professional members. The Association represents over 55,000 individuals, primarily human resource professionals and administrators in the public sector. IPMA attempts to foster and develop interest in sound human resources administration, by providing a focus and forum for human resources professionals throughout the United States and abroad.

Michigan Municipal League

The Michigan Municipal League ("MML") is a nonprofit association organized for the purpose of improvement of municipal government in Michigan by cooperative effort. It is the only organization of its kind in the State of Michigan and represents 516 cities and villages. The MML has been in existence since 1899. The Michigan Association of Municipal Attorneys is affiliated with the MML and its first chartered section. Programs and services of the MML include: educational seminars; publications; research; legislative advocacy; labor relations, human resources and management consulting services; and risk management and insurance.

Nearly 400 of the League's cities and villages are also members of the MML's Legal Defense Fund. The purpose of the Legal Defense Fund is to provide support and representation for its member cities and villages in litigation of statewide municipal significance in state and federal courts. In addition, the MML has been involved, through its Legal Defense Fund, in matters in other states that have an impact on local government issues. As such, the Legal Defense Fund, on behalf of its members, must be concerned with compliance with the FLSA and its implementing regulations, and may represent its members in litigation involving these matters.

National Public Employer Labor Relations Association

The National Public Employer Labor Relations Association ("NPELRA") is the professional association for labor relations directors serving city, county, state and special district governments. NPELRA members negotiate contracts with the unions representing governmental employees, including police officers. In their daily work, NPELRA members must apply both state and local labor laws, including the FLSA.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

We respectfully submit that the foregoing statement of the interests of the *amici* makes plain the extraordinary importance of this case to state and local governments throughout the Nation. *Amici* and other state and local governments face enormous potential liability to employees. If ordered to pay these employees back overtime and liquidated damages, then these government entities would find themselves paying enormous sums for work performed long ago and, more important, for work performed by employees who understood both that they were to work as many hours each week as necessary to discharge their responsibilities and that they they would not be paid overtime for any such additional work.

Looking forward, governmental *amici* may be required either (a) to pay overtime to supervisory employees, notwithstanding the fact that such employees were hired with the understanding that they would be paid salaries which did not include any overtime pay; or (b) to bring their personnel policies into conformity with regulations that were adopted in an era in the Nation's economic history much different from that of the present, and at a time when the FLSA specifically did not apply to the public sector. *See* 19 Fed. Reg. 4405 (1954) (initial adoption of "salary basis test") (discussed at DOL Exemptions from Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employees, 57 Fed. Reg. 37,666 (1992); *see also* 29 CFR § 541.118(a)(5).

In addition, the question of whether the national political process has failed -- within the meaning of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528

(1985) -- could not be more squarely presented. Below, the Court of Appeals stated, in part, "[Petitioners] presented no evidence to suggest that [they are] unable to ... lobby Congress to amend the [FLSA] or elect new congressmen who might do so ...." (7a).[5] We respectfully submit that the Court overlooked what is perhaps the most significant way in which the national political process has failed the states and cities in this instance. Like the other states, counties, and municipalities appearing as *amici* in support of this petition, the City of New York has no vote; however, the literally thousands of plaintiffs in the actions against the City mentioned above have literally thousands of votes. The City of New York does not contribute to the campaigns of senators and representatives. The plaintiffs in these cases, however, as well as those in the cases described by the other *amici*, may do so either individually, or collectively, through Political Action Committees or, where applicable, through their unions (*see* 104a, 107a-108a, 124a).

In short, petitioners submitted highly probative affidavits, of highly qualified experts, explaining that the national political process has failed the states and cities in this instance, both in the foregoing way and in many others (99a-132a). Moreover, these same experts provided extensive deposition testimony in support of this position, and that testimony is in the record at bar. The City of New York's Office of the Corporation Counsel has monitored the caselaw in this area and, from time to time, has also had occasion to speak with attorneys for other public defendants in similar cases. We are not aware of another case in which a public defendant has developed such an extensive record on the question of whether the national political process has failed the states and local governments. Should this Court agree with petitioners, that if the proper balancing test under *Garcia* is applied then petitioners' proof establishes that the national political process has failed, then it follows that states and local governments would no longer be required to bear the burden of complying with DOL's arbitrary interpretation of the managerial exemption.

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[5] Unless otherwise indicated, numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

If the evidence in the record herein does not call for a review as to whether there has been a failure of the political process as contemplated by *Garcia* and *South Carolina v. Baker*, 485 US 505, 512 (1988), *rehearing denied*, 486 US 1062 (1988), then we cannot imagine what, in fact, would constitute such a failure.

CONCLUSION

For all of the above-stated reasons, the *amici* respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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No. 98-1802

In The

Supreme Court of the United States

◆

BALTIMORE CITY POLICE DEPARTMENT, et al.,
Petitioners,
v.
FRATERNAL ORDER OF POLICE, LODGE 3, et al.,
Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

REPLY BRIEF

◆

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REPLY BRIEF

The Respondents' Brief in Opposition ("Resp.") interjects additional issues and contains erroneous assertions of fact and law that require correction. For these reasons and to identify apparent substantial concessions, a reply is warranted.

1. Respondents Erroneously Assert that this Petition does not Address the Primary Duty Test of Part 541

Respondents suggest the Petition raises administrative law issues not present in this case by repeatedly suggesting that Petitioners' arguments are directed solely to the "salary basis" test of Part 541 and not to the "primary duties" tests (vast majority of sections, *see, e.g.*, App. 141a-152a). They assert the "Police Department has not attempted to mount any sort of challenge to the primary duty test portion of Part 541." Resp. at 9; *see id.* at 2, 4, 8, 9, 11. Petitioners prevailed on the salary basis test issues on summary judgment, App. 18a-24a, 72a, so Respondents argue that issues on which Petitioners prevailed below were certified under 28 U.S.C. § 1292(b). App. 3a-6a, 75a-76a. The challenge to the primary duty tests was preserved. *E.g.*, Fourth Am. Answer ¶ 32; Defs.' Mot. for Partial Summ. J. at 84, 97-98; Defs.' Reply in Supp. of Mot. for Partial Summ. J. at 39; Appellants' Br. at 27; Appellants' Pet. for Reh'g at 9.

Respondents acknowledged the primary duty test was at issue on summary judgment, claiming that "[i]n reference to the primary duty test . . . there was clearly adequate notice and comment." Pls.' Resp. to Defs.' Mot. for Partial Summ. J. at 36. They also addressed the primary duty test at argument on the motion: "[W]hat the Defendants . . . do is extrapolate and say, . . . because we don't have any affirmative response by DOL regarding the *primary duty test*, . . . they must be ignoring some comments. . . . " Hearing Tr. at 96-97 (Oct. 13, 1995) (emphasis added); *see id.* at 149.

The district court expressly acknowledged the issue and decided it: "Defendants rely on numerous [DOL] comments . . . to support their contention that Part 541, *in its* *entirety,* is arbitrary, capricious, and inconsistent with congressional intent. . . . While applying the *primary duty test* to public sector plaintiffs in paramilitary organizations is not without its impracticalities, there is no evidence that it is an impermissible construction of the FLSA." App. 60a (emphasis added). It is that ruling on the primary duty test that was addressed on appeal, as both Respondents and DOL acknowledged.

Before the Fourth Circuit, DOL, as *amici curiae*, acknowledged that the primary duty test was at issue on appeal. "The police department . . . has also established no reason why the *duties tests* cannot apply to public sector law enforcement. . . . There is nothing inherent in police management that prevents the City of Baltimore . . . from satisfying the *Part 541 duties tests.*" Brief for [DOL] as Amicus Curiae at 29 (emphasis supplied). Respondents likewise asserted: "[Petitioners] make [ ] the unsupported assumption that, because there were not other changes in the regulations, particularly changes in the *primary duty test*, that there was *ipso facto* some failure in the process." Appellees' Br. at 9 (first emphasis added).

Petitioners' first question presented addresses administrative law challenges to Part 541's primary duty test. Pet. at i; *see id.* at 2-4, 8-9, 12-15, 19-24. Respondents failed to acknowledge here the regulations subject to Petitioners' challenge and, consequently, failed to explain why the primary duty test issues are not worthy of this Court's attention.

2. The Court Invited this Petition in *Auer* and There is Post-*Auer* Confusion among the Lower Courts

a. The Court Invited a Petition Presenting these Challenges to Part 541

Respondents acknowledge that in *Auer v. Robbins,* 519 U.S. 452 (1997), this Court expressly drew a "distinction between [1] a challenge to an agency's failure to amend a regulation and [2] a challenge to an agency's regulation [*a*] based on its interpretation of the enabling statute or [*b*] based on flaws in procedural requirements under the APA," Resp. at 1, such as a failure to comply with notice-and-comment requirements in promulgating regulations. Respondents assert that the Court could have been clearer if it intended to "express a desire to hear a case specifically addressing the disciplinary-deduction rule of Part 541 as applied to state and local governments." Resp. at 1-2. But that is not the issue presented in the Petition. The Petition here challenges DOL's Part 541 regulations on the grounds that (a) application of Part 541 in this context produces results that are arbitrary, capricious, and inconsistent with congressional intent, Pet. at 24, and (b) DOL failed to comply with notice-and-comment requirements, *id.* at 19-22. It appears the Court did invite this case.

b. Post-*Auer* Confusion Among the Lower Courts Emphasizes the Importance of Resolving the Issue Now

Petitioners explained that the *Auer* statement that a party must first bring certain challenges to an administrative agency before asserting them in court was purely *dicta.* Pet. at 12-13, 22-23. Respondents do not claim otherwise, essentially conceding error below.

Lower courts are divided on the meaning of the *Auer dicta. See* Pet. at 13-15. Respondents' analyses of that confusion shows that the Fourth Circuit's error reflects a larger problem.

Respondents note that "[s]everal cases" identified in the Petition arise in a context where only the salary basis test of Part 541 is at issue. Resp. at 2. Respondents do not assert, however, that only the salary basis test of Part 541 was at issue in all the cited cases. *See* Pet. at 13-14 (discussing *Apfel, Cassell, Hernandez, Fort Hood Barbers Ass'n,* and *Boyd*). Moreover, *Adams v. United States,* 40 Fed. Cl. 303 (Fed. Cl. 1998), involved federal employees who are not subject to DOL's salary basis test. *Id.* at 304-05, 308. Respondents' effort to limit the *Auer dicta* to the salary basis test not now at issue, *see* pages 1-2 *supra*, actually undermines Respondents' position. Either that *dicta* applies only to the salary basis test not at issue here, or the cited cases demonstrate the confusion among the lower courts as to the meaning and breadth of the *Auer dicta.*

Respondents note that three cases identified in the Petition "did not challenge rulemaking procedures, but addressed agency interpretation, invoking analysis under *Chevron*." Resp. at 3. That point was precisely what Petitioners sought to demonstrate; in those cases the courts did not read *Auer* as foreclosing challenges on grounds that the regulations are arbitrary, capricious, or not otherwise in accordance with law. Respondents thus effectively concede that these cases conflict with the Fourth Circuit in this case and with cases from the Third, Seventh, and Eleventh Circuits addressed above. *See* Pet. at 13.

Respondents assert that *Cassell v. FCC*, 154 F.3d 478 (D.C. Cir. 1998), "specifically declined to address a rulemaking challenge under the exhaustion doctrine." Resp. at 3 (citing 154 F.3d at 485). But that court did go on to address the merits of the notice-and-comment challenge to the extension of preexisting regulations. 154 F.3d at 486.[1]

3. This Case Presents a Record for *Garcia* Balancing

Respondents refer to *Printz v. United States*, 117 S. Ct. 2365 (1997), and *New York v. United States*, 505 U.S. 152 (1992), and assert: "Neither case made any references to balancing tests." Resp. at 5. To the contrary, the *Printz* Court explained that "such a 'balancing' analysis [as employed in several earlier Tenth Amendment cases] is inappropriate" in the circumstances of *Printz*. 117 S. Ct. at 2383. Various authorities have recognized that *Printz's* "balancing" characterization encompasses *Garcia v. SAMTA*, 469 U.S. 528 (1985). *E.g.*, *Pryor v. Reno*, 171 F.3d 1281, 1286-87 (11th Cir. 1999); *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998), *cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818); *see also* Brown, *Stealth Statute – Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 299 (1998).

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[1] Moreover, the *Cassell* exhaustion issue arose because during the course of an administrative adjudication the party failed to present an issue he sought to raise on appeal.

4. This Case Presents Issues of Extreme National Importance

a. The FLSA Imposes Billions of Dollars in Costs Nationwide

Respondents belittle the "enormous costs" imposed by the FLSA because governmental "entities . . . receive a sizable amount of federal money each year, *even if not linked directly to the FLSA*." Resp. at 7 (emphasis added). Even directly related payments may not be relevant. *See Garcia*, 469 U.S. at 555 n.21. When this Court has permitted federal regulation of States under Spending Clause legislation, the Court has required "germaneness" or "relatedness" between the federal funding and the conditions. *E.g., South Dakota v. Dole*, 483 U.S. 203, 208 & n.3 (1987). No such nexus is necessary if the Commerce Clause authorizes costly requirements (such as the FLSA) upon all State and local governments without one.

Nor does the fact that Congress may impose unfunded costs under some Commerce Clause legislation, *see* Resp. at 7-8, necessarily mean that all such Commerce Clause legislation passes constitutional muster. *See United States v. Lopez*, 514 U.S. 549 (1995). Moreover, the constitutionality of the very statutes cited as examples remains unsettled. *E.g., Kimel v. Florida Bd. of Regents*, 119 S. Ct. 901, 902 (1999) (Nos. 98-791 & 98-796) (challenging the ADEA). The Court is likely to be called upon to revisit the scope of the commerce power as soon as next Term. *E.g., Brzonkala v. Morrison*, No. A-978 (U.S. June 8, 1999) (granting enlargement for petitioning for certiorari); *United States v. Morrison*, No. A-977 (U.S. May 25, 1999) (same).

Citing the 1985 FLSA Amendments, Respondents point to mitigating provisions as evidence of State effectiveness in the political process. Resp. at 14. To say that when confronted with *Garcia*-sanctioned federal occupation of State wage authority and potentially unlimited, retroactive back-pay liability, States were effective because they received some mitigation, is like saying the Kosovar Albanians were effective in the Yugoslavian political process because occupying Serbian armies allowed some ethnic Albanians to leave Kosovo rather than be killed.

b. DOL Did Not Comply with APA Notice-and-Comment Requirements

Respondents no longer assert that the rulemaking DOL initiated in 1985 satisfied the notice-and-comment requirements for Part 541 or that DOL's proceedings on Part 541 prior to extension of the FLSA to the public sector is sufficient.[2]

Respondents now assert only "that notice and comment rulemaking existed in reference to the original 1974 amendments extending the FLSA to state and local governments." Resp. at 10. Respondents do not cite any proceeding other than on the original version of Part 553. DOL did not institute a Part 541 rulemaking in 1974, or at any time prior to *Garcia*, to implement the 1974 Amendments to the FLSA, because the 1974 Amendments were enjoined and not effective. *See National League of Cities v. Brennan,* 419 U.S. 1321 (1974).[3] Thus, they rely exclusively on Part 553 to validate Part 541.

Respondents argue that Part 541 "was adopted for application to the public sector . . . in Part 553" through a cross-reference to Part 541 in 29 C.F.R. § 553.32. Resp. at 9; *see id.* at 10-11. But when DOL promulgated Part 553, both in 1987 and 1974, it acknowledged receiving comments on revisions to Part 541 but refused to address them in the Part 553 proceeding because of the "pending" Part 541 rulemaking. Pet. at 8, 21 (citing 52 Fed. Reg. 2012, 2019, 2023 (1987) (App. 89a); 39 Fed. Reg. 44,142, 44,142 (1974)). Such proceedings cannot satisfy the requirement that the agency *consider* and *address* comments received. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 316 (1979) (agency must provide

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[2] Without citation, Respondents assert that States and municipalities "were also able to participate in the initial notice and comment rulemaking under which the current rules are promulgated." Resp. at 13. If Respondents intend to defend the adoption of Part 541 decades prior to the 1974 Amendments to the FLSA, they do not explain how notice was adequate for States and municipalities at a time when they were expressly excluded from FLSA coverage.

[3] In their Fourth Circuit reply (at page 14 & attachments A & B) Petitioners submitted all 1974 Federal Register notices affecting Part 541 (proposing only dollar limit adjustments).

"the consideration that is the necessary and intended consequence of" permitting "interested persons notice and an opportunity to comment"); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972) ("after consideration of the record so made the agency shall" provide "a concise general statement of their basis and purpose").

c. When Applied to State and Local Government Employers, Part 541 Produces Results which are Arbitrary, Capricious, and Contrary to Congressional Intent

Respondents incorrectly assert: "The Supreme Court has already passed on the propriety of such application [of DOL regulations to public sector employees] in numerous cases, including *Garcia* and *Auer*." Resp. at 7. *Garcia* considered solely whether the Tenth Amendment proscribed application of the FLSA to a local transit authority. 469 U.S. at 536. This Court did not address whether pre-existing Part 541 properly applied to State and local governments. *Id.* at 557. In *Auer*, the Court below held that the salary basis test of Part 541 was satisfied. *Auer v. Robbins*, 65 F.3d 702, 711 (8th Cir. 1995). This Court affirmed, but, in *dicta*, dismissed on procedural grounds an "arbitrary and capricious" challenge to that test raised for the first time in this Court. *Auer*, 117 S. Ct. at 910. The Court did not consider the *merits* of the challenge. This Court has never considered the merits of Part 541's primary duty tests as applied to police management – the challenge presented here.

The Fourth Circuit erroneously refused to address Petitioners' substantive challenge to Part 541, citing the *Auer dicta*. Respondents do not attempt to show that the language in *Auer* is anything other than *dicta*.

Petitioners demonstrated the *Auer dicta* is flawed on many grounds, relying on several lines of Supreme Court precedent. Pet. at 23-24. Respondents ignore those arguments and only purport to distinguish the identified cases because they "did not address rulemaking or notice and comment challenges" but only evaluated an "agency interpretation utilizing an arbitrary and capricious standard." Resp. at 3. That distinction shows that the *Auer dicta* excludes more than notice-and-comment challenges. Instead, Respondents confirm Petitioners' point that their defenses may be raised first in court.

Petitioners also explained that *Auer* did not consider the futility of requiring a formal petition to DOL when a rulemaking is already pending. Pet. at 23; *see id.* at 6, 7, 21, 22. Respondents' only answer claims this Petition is limited to the salary basis test. Resp. at 11. It is not, *see* pages 1-2 *supra*, and DOL's pending Part 541 proceeding solicited comments on the "duties and responsibilities" tests. 50 Fed. Reg. 47,696 (1985) (App. 87a).[4]

On the merits of applying pre-existing Part 541 to the public sector, Respondents rely exclusively on congressional *inaction*. Resp. at 12. But "congressional silence lacks persuasive significance." *Brown v. Gardner,* 513 U.S. 115, 121 (1994); *see Zuber v. Allen,* 396 U.S. 168, 185 n.21, 193 n.28 (1969). Moreover, here, DOL has repeatedly assured Congress and the public that it is in the process of addressing the Part 541 issues.

d. Balancing the Evidence Shows a Failure in the National Political Process

Respondents do not refute the document-supported *evidence* of federalism experts, Congressman John N. Erlenborn and Professor A.E. Dick Howard, who were uncontradicted by other witnesses. Instead, Respondents assert that "neither . . . was able to show with particularity" defects and burdens "in the instant case" or "any sort of nexus between the application of Part 541" and "the failure of the national political process." Resp. at 13.

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[4] In the district court, Petitioners introduced an example of primary duties tests comments filed in response to this DOL notice. Ex. 36. When Respondents suggested to the Fourth Circuit that DOL did not receive such comments, Petitioners filed numerous additional examples. That court took judicial notice of these submissions by order filed July 3, 1997.

DOL amended the salary basis test by adding a new section, 29 C.F.R. § 541.5d, in 1992, in a separate notice-and-comment proceeding. Pet. at 21. DOL again refused to consider comments on other aspects of Part 541. 52 Fed. Reg. 37,666, 37,674 (1992) (App. 92a). Therefore, when DOL referred to "public sector employees" and acknowledged in 1994 that "the regulations are sorely out-of-date, and a comprehensive rulemaking is necessary," DOL's statements encompassed the "primary duty" tests.

The depositions of Congressman Erlenborn and Professor Howard, *see* Ex. 222, Ex. 220, their declarations, *see* App. 99a-112a, 113a-132a, plus exhibits, *see* 96a-98a, detailed the political process changes which cumulatively, they conclude, result in failures in the national political process which unduly burden States. Professor Howard specifically tied these cumulative failings to the ineffectiveness of State and local governments in lobbying Congress for exemptions from the FLSA following *Garcia*. App. 115a, 125a-126a. This abundant *evidence* (which *is* tied to the FLSA) should be considered in the *Garcia* "balancing test" rather than dismissed out-of-hand as occurred in this case below. App. 6a-7a; 64a-65a.

The district court acknowledged that it did not understand the test. App. 63a-64a. Petitioners demonstrated the total absence of reported cases purporting to apply a *Garcia* balancing, confirming this confusion throughout the federal judiciary. Pet. at 16-17. This comprehensive *evidentiary* record directed specifically to that test warrants review.

e. Application of the FLSA and DOL's Implementing Regulations to Police Management is Unconstitutional

Respondents' argument that Petitioners raise no credible argument under the Commerce Clause fails to cite *Lopez*. Respondents' view of the Commerce Clause recognizes nothing that falls outside congressional power; it would justify a general federal police power that would have upheld even the statute invalidated in *Lopez*.

Respondents similarly reject *Printz's* explanation of the Necessary and Proper Clause. Resp. at 15. *Printz* rejected the reading which Respondents now advocate. Pet. at 28; *see also Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 338-39 (1935).

Respondents argue that the Guarantee Clause is irrelevant because only the "ultimate arbiter of policy" (*i.e.*, the Police Commissioner or Mayor) exercises the type of discretion essential to maintaining a republican form of government. Resp. at 16-17. Referring to police officers (not to mention supervisory sergeants and lieutenants), this Court has recognized their "broad powers," their "exercise [of] . . . a very high degree of judgment and discretion," and that they perform "a most fundamental obligation of government." *Foley v. Connelie,* 435 U.S. 291, 297, 298 (1978); *see City of Chicago v. Morales,* 67 U.S.L.W. 4415, 4420 & n.32 (U.S. June 10, 1999) (No. 97-1121). The police should join governors, legislators, and judges within the Guarantee Clause's protection because they control "how often that [State's] power is exercised." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 COLUM. L. REV. 1, 56 (1988).

Respondents argue that "*New York* and *Printz* should not be read to alter the way the Court views federalism" because they did not apply *Garcia*. Resp. at 17-18. The fact that these cases address Tenth Amendment issues without relying upon *Garcia* places the vitality of *Garcia* in issue. Respondents dismiss process-oriented federalism theory as "circular," *id.* at 18, by overlooking the fact that the 1938 enactment of the FLSA applied to only the private sector so that in 1974 States were isolated in the political process. The Court currently has on its docket a case which may focus on process-oriented federalism. *See Reno v. Condon,* 119 S. Ct. 1753 (1999) (No. 98-1464).

CONCLUSION

The Petition for a Writ of Certiorari should be granted. In the alternative, the Petition should be held pending the decisions in *Condon, Kimel*, and, if granted, *Brzonkala*, and then addressed as appropriate in light of the decisions in those cases.

Respectfully submitted,

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